TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted]

No. [redacted] 131

R. B. SMYER AND UNITED STATES FIDELITY AND GUARANTY COMPANY, APPELLANTS,

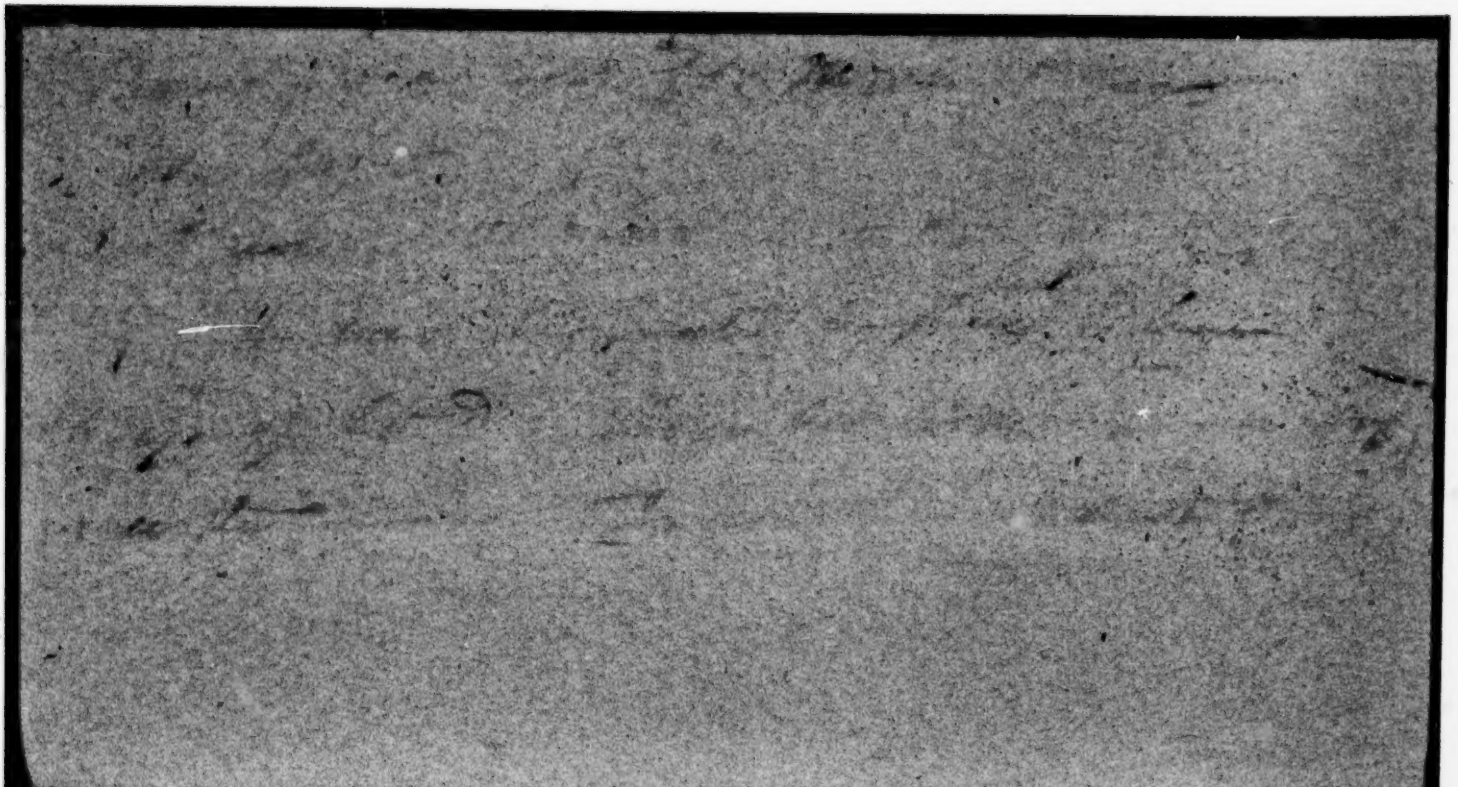
vs.

THE UNITED STATES OF AMERICA

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

FILED JUNE 1, 1925

(31,243)



(31,243)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 520

R. B. SMYER AND UNITED STATES FIDELITY AND GUARANTY COMPANY, APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TRANSCRIPT OF RECORD

UNITED STATES CIRCUIT COURT OF APPEALS

FIFTH CIRCUIT

AT LAW

No.----------

RUFUS B. SMYER AND UNITED STATES FIDELITY AND GUARANTY CO.,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA

E. J. SMYER, Birmingham, Ala.
B. F. SMITH, Birmingham, Ala.
Attorneys for Plaintiffs in Error.
C. B. KENNAMER, Birmingham, Ala.
United States Attorney

AGREEMENT OF COUNSEL

Filed December 1, 1924
CHAS. J. ALLISON, CLERK

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

United States of America, *Plaintiff,* vs. Rufus B. Smyer, and United States Fidelity and Guaranty Company, a Corporation, *Defendants.*	At Law No. 2980 Agreement of Counsel

The plaintiff and the defendants in the above stated cause, by their attorneys and with the approval of the judge of the trial court, agree as follows:

1. There were 1560 tags representing or pertaining to the shipments and of the money embezzled by Smith and these respective tags showed the name of the shipper, the name of the consignee, place of shipment, C.O.D. number, date mailed, C.O.D. charge paid and fee for money order and address of addressee.

These tags are listed in the sixth count of the complaint added by amendment and by amendment are made a part of each of the other counts in the complaint, and the list of these tags cover seventy pages of legal cap paper.

It is agreed that all of these pages listing tags may be omitted from the transcript of the record made out by the clerk of the trial court and may also be omitted from the printed record as immaterial matter, the record to be considered the same as if these tags were set forth and the omission is without prejudice to the plaintiff.

2. Original count 5 of the complaint was withdrawn by the plaintiff after demurrers filed and count two of the complaint as amended was withdrawn by plaintiff all with leave of the court and it is agreed that neither of these counts or the demurrer pertaining thereto are to be set forth in the transcript of the record in this cause made up by the clerk of the trial court or in the record to be printed. Defendants agree to the addenda hereinafter set forth herein.

3. The defendants expressly waive each and every ground of demurrer not specified in assignment of error.

4. That this agreement be filed in this cause and with the approval of the trial court made a part of the record in this cause, and embraced in the transcript of the record made by the clerk of the trial court.

This 1st day of Dec., 1924.

E. J. SMYER AND B. F. SMITH,
Attorneys for Defendants.

(See Addenda.)

JIM C. SMITH,
Attorneys for Plaintiff.

Approved:

W. I. GRUBB, *District Judge.*

Addenda: It is understood that either party to this litigation may, if deemed necessary or expedient, have sent to the Circuit Court of Appeals any or all of the original papers, or certified copies thereof, filed in the lower court in this case. This 1st day of Dec., 1924.

JIM C. SMITH,
Assist. U. S. Attorney.

SUMMONS AND COMPLAINT

Filed July 3, 1924
CHAS. J. ALLISON, CLERK

UNITED STATES OF AMERICA
DISTRICT COURT OF THE UNITED STATES FOR THE
NORTHERN DISTRICT OF ALABAMA,
SOUTHERN DIVISION

The President of the United States of America to the Marshal of said District—GREETING:

You are hereby commanded to summon Rufus B. Smyer, who is a citizen of the State of Alabama, and United States Fidelity and Guaranty Company, a Corporation, a citizen of the State of Maryland, to appear before the Honorable District Court aforesaid, at the place of holding said Court, at Birmingham on the first Monday of September next, to answer the complaint of The United States of America who___citizen of the State of____, and have you then and there this Writ:

Witness, the HON. W. I. GRUBB, Judge of the District Court of the United States for the Northern District of Alabama, this third day of July in the year of our Lord one thousand nine hundred and twenty-four.

Issued the 3rd day of July, in the year of our Lord one thousand nine hundred and twenty-four.

CHAS. J. ALLISON,
Attest: *Clerk U. S. District Court,*
Northern District of Alabama.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

United States of America, *Plaintiffs,* vs. Rufus B. Smyer, and United States Fidelity and Guaranty Company, a Corporation, *Defendants.*	At Law. No. 2980

The United States of America, plaintiffs in this suit, appearing by their duly authorized attorney, C. B. Kennamer, in and for the Northern District of Alabama, complain of Rufus B. Smyer, a citizen of the state of Alabama and the United States, and an inhabitant of Birmingham, Jefferson County, in the Southern Division of the Northern District of Alabama, and the United States Fidelity and Guaranty Company, a corporation, organized under the laws of the State of Maryland, and doing business in the State of Alabama, with an office and agent in the city of Birmingham, Jefferson County, in the Southern Division of the Northern District of Alabama, and say and allege as follows:

COUNT ONE

(1) That on, to-wit, the 4th day of February, A.D., 1920, the above-named Rufus B. Smyer was duly appointed postmaster of the United States Post Office at Birmingham, Alabama, and thereafter did duly execute the prescribed oath of said office and did duly qualify as such postmaster, and was duly commissioned as such postmaster by the proper authorities of the United States on the second day of March, 1920, and thereupon en-

tered upon the discharge of his duties as said postmaster, and then became, remained and was at all the times mentioned in this complaint such postmaster aforesaid.

(2) That on, to-wit, the tenth day of February, A.D., 1920, the defendants, Rufus B. Smyer and the United States Fidelity and Guaranty Company, a corporation, did execute and deliver to the plaintiffs a certain bond, as required by Section 3834 of the Revised Statutes of the United States, which said bond was from time to time renewed by the said defendants and was in force and effect and binding upon the parties thereto during all the times mentioned in this complaint, which said bond was in the following words, figures, characters and letters, to-wit:

----------	Mar 25 1920
(Name of Surety Company.)	(Date of Commission.)
----------	Mar 26 1920
(Change of Name)	(Date Commission Mailed)

(Change of Site) (M. O. or Not M. O.)

(Same P.M., Acting P.M., Changing name by marriage.)

POST OFFICE DEPARTMENT
(Internal Revenue Documentary Stamp)

BOND OF POSTMASTER

KNOW ALL MEN BY THESE PRESENTS, That we, Rufus B. Smyer of Birmingham, in the County of Jefferson, State of Alabama, as principal, and United States Fidelity and Guaranty Company, a corporation, whose principal office is located in the City of Baltimore, State of Maryland, as surety, do hereby bind ourselves, our heirs, executors, administrators, successors, and assigns,

jointly and severally, to pay to the United States of America the sum of one hundred thousand dollars ($100,000).

IN WITNESS WHEREOF we have hereunto subscribed our names and affixed our seals this tenth day of February, in the year one thousand nine hundred and twenty.

WHEREAS the above-bound Rufus B. Smyer was on February 4, 1920, appointed postmaster at Birmingham aforesaid, and has duly executed the prescribed oath of office,

Birmingham, Alabama, 1st Quarter
1923 Renewed.

NOW THE CONDITION OF THIS OBLIGATION Is that if the said Rufus B. Smyer shall faithfully discharge all duties and trusts imposed on him by law and by the regulations of the Post Office Department, and shall perform all duties as fiscal agent of the Government imposed on him by law or by regulation of the Treasury Department made in conformity with law, and also perform all duties and obligations imposed upon and required of him by law or by the regulations of the Post Office Department in connection with the receipt and custody of stamped envelopes, newspaper wrappers, and postal cards, and their distribution to postmasters, and faithfully account for all such stamped envelopes, newspaper wrappers, and postal cards, as may come into his custody, and shall also perform all duties and obligations imposed upon or required of him by law, or by regulation made pursuant to law, in connection with the Postal Savings Depository System, then this obligation shall be void; otherwise, of force.

The above condition was attached to this bond before its execution and delivery.

Signed and Sealed in the Presence of:
(Witnesses as to signature of postmaster)
NAN ELLEN CARSON
CHARLES L. STAPLETON

(Witnesses as to signatures of officers or agents of surety Company.)

CHARLES GANDY

ELLIOTT WILLIAMS.

(Signature of postmaster below in full)

RUFUS B. SMYER (Seal)

LEE McGRIFF

By *Atty. in Fact.*

(Signature of executing officer)

Attest ----------

Agency at ----------

(Seal of Surety Company)

(The spaces below are to be used if individual sureties are furnished.)

(Witnesses as to signatures of individual sureties)	(Signatures of individual sureties below.)
----------	----------(Seal)
----------	----------(Seal)
----------	----------(Seal)
----------	----------(Seal)
----------	----------(Seal)

Bond accepted Mar 2-1920

For the Postmaster General

By J. C. KOONS

First Assistant Postmaster General

CAL CRH

CERTIFICATE AS TO PREMIUM CHARGED BY SURETY COMPANY

The premium on this bond is $1.00 per $1,000. The rate of premium charged for a like bond during the calendar year 1908 was $1.00 per $1,000.

LEE McGRIFF, *Atty in fact*

(Signature of officer or agent) Title

Bond sent----------

New Bond sent, Jan 8-1923

Reasons ----------

OATH OF OFFICE

(This oath need not be executed by a person now in charge as postmaster unless the bond is executed under a reappointment)

I, Rufus B. Smyer, having been appointed postmaster at Birmingham, in the county of Jefferson, and State of Alabama, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign or domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter: SO HELP ME GOD.

I do further solemnly swear (or affirm) that I will faithfully perform all the duties required of me, and abstain from everything forbidden by the laws in relation to the establishment of post offices and post roads within the United States; and that I will honestly and truly account for and pay over any money belonging to the said United States, which may come into my possession or control; SO HELP ME GOD.

RUFUS B. SMYER
(Signature of Postmaster.)

Sworn to and subscribed before me, a Notary Public for the County of Jefferson, State of Alabama, this 27 day of February, 1920; and I certify that, to the best of my knowledge and belief, the person above named is of an age at which he is competent to contract by deed under the laws of this state.

JESSIE N. ROWLAND,
(Official Seal) *Notary Public.*

Requests to report on the sufficiency of individual sureties have been made as follows:

Postmaster, _____
County Clerk, _____

Chief Inspector_____
Investigation showed Bond sufficient.

(3) That, among other covenants, said bond was conditioned that "if the said Rufus B. Smyer shall faithfully discharge all duties and trusts imposed on him by law and by the regulations of the Post Office Department, and shall perform all duties as fiscal agent of the Government imposed on him by law or by regulation of the Treasury Department made in conformity with law, * * * then this obligation shall be void; otherwise, of force." That one of the duties imposed by law and the regulations of the Post Office Department upon the said Rufus B. Smyer, as such postmaster, was and is that the said Rufus B. Smyer, as such postmaster aforesaid, "shall keep safely, without loaning, using, depositing in an unauthorized bank, or exchanging for other funds, all the public money collected by him and which came into his hands, possession and under his control, until such public money was ordered by the postmaster-general to be transferred or paid out; and that it was also the duty of the said postmaster to issue money orders to patrons of said postoffice and to deposit to the credit of the government the various sums of money collected by him from patrons of said office for the issuance of money orders, and it was then and there the duty of the said Rufus B. Smyer, as such postmaster, to render accounts of his receipts and expenditures as such postmaster to the post-office department, in the manner and form prescribed by the postmaster general, and pay the balance of all moneys that should come to his hands from money orders issued by him, and received by him for the issuance of money orders, and to keep all the public money collected by him in the manner and form prescribed by law and the regulations of the post-office department.

(4) The plaintiffs allege and complain further that the said Rufus B. Smyer did not and has not well and faithfully executed and discharged the duties and trusts imposed on him as such postmaster by law and by the regulations of the post-office department in this, that is to say, that during the fall of the year, 1921, the particular and exact date and dates being unknown, but during the period of time from July 1, 1921, to December 31, 1921, the said Rufus B. Smyer, as such postmaster, received into his hands, possession and under his control a large sum of money in the sum and of the value of Ten Thousand Twenty-eight Dollars and Sixty-six Cents ($10,028.66) which said money was received into the hands, possession and under the control of the said Rufus B. Smyer, postmaster aforesaid, for the sale of money orders, and during the same period of time he received into his hands, possession and under his control the sum of Ninety-one Dollars and Fifteen Cents ($91.15) as fees for the issuance by him of money orders; that the said total sum of money aforesaid of the value and in the sum of Ten Thousand One Hundred Nineteen Dollars and Eighty-one Cents ($10,119.81), so received into the hands, possession and under the control of the said postmaster aforesaid for the sale of money orders including the fees thereon for the issuance of said money orders, as aforesaid, was not safely kept by the said Rufus B. Smyer, postmaster, until it was ordered by the postmaster-general to be transferred or paid out, as was then and there required of him by law and by the regulations of the post office department; that the said Rufus B. Smyer, postmaster aforesaid, did fail and neglect to render his account to the post-office department covering said sum of money, and did not pay the said sum of money aforesaid and did not deposit said

sum of money aforesaid to the credit of the post office department as was then and there required of him by law and by the regulations of the post office department, said sum of money being public funds of the United States.

(5) That, before the commencement of this suit, the plaintiffs, through their duly authorized agents, have demanded of the defendants the payment of the amount and value of money sued for and claimed herein, and the defendants have duly refused to comply with said demand.

(6) That by reason of the foregoing facts and premises there is due and owing to the plaintiffs from the defendants above-named, and each of them, the sum of Ten Thousand One Hundred Nineteen Dollars and Eighty-one Cents ($10,119.81), with interest thereon from December 31, 1921, no part of which has been paid by the defendants.

Wherefore the plaintiffs demand judgment that it have and recover of and from the defendants, and each of them, the sum of Ten Thousand One Hundred Nineteen Dollars and Eighty-one Cents ($10,119.81), with interest thereon at the rate of eight per cent per annum from December 31, 1921, besides its costs and disbursements herein incurred.

(Count 2 Omitted.)

COUNT THREE

For a third cause of action, the plaintiffs hereby adopt and make a part of this count of this complaint all the words, figures, signs and characters included in the first count of this complaint down to and including the copying and setting forth of the bond set forth in and

made a part of the first count of this complaint, and in addition thereto further say and allege:

That at divers and sundry times and dates during the months of, to-wit, August, September, October, November and December of the year 1921, the said Rufus B. Smyer, postmaster, at Birmingham, Alabama, received into his official charge and custody and under his control and supervision various and sundry sums of money from various and sundry patrons of said post office, receiving said sums of money from said patrons in payment by said patrons of said post office of collect-on-delivery parcel post packages, whereupon, upon the payment to and the receiving by said postmaster of said sums of money, collected by him on collect-on-delivery parcel post packages and shipments, it became and was the duty of the said postmaster to use and employ said sums of money so received and collected by him for the sale of money orders, which said money orders it was his duty to send and transmit to the shippers of the respective parcel post packages delivered by him to patrons of said post office, the said sums of money so collected by him, immediately upon the same being collected by him and coming into his possession then and there becoming and being moneys received by him for the sale of money orders, and it then and there becoming and being his duty to send, not later than the day after the receipt of said sums of money, money orders for the amounts of moneys so collected by him on collect-on-delivery parcel post packages and shipments, to the respective shippers of said parcel post packages and shipments; that the said Rufus B. Smyer, as such postmaster, collected and received into his hands, possession and under his control during the period of time aforesaid sums of money amounting to the sum and

value of Ten Thousand One Hundred Nineteen Dollars and Eighty-one Cents ($10,119.81), which money it was then and there his duty as postmaster to safely keep and properly account for the same to the post office department of the United States. That the said bond, set forth in count one of this complaint and hereby referred to, was breached in this, that the said Rufus B. Smyer, as such postmaster, having so received into his hands, possession and under his control the said sum of Ten Thousand One Hundred Nineteen Dollars and Eighty-one Cents($10,119.81), as and in the manner and form aforesaid, which said sum of money was then and there public money belonging to the post office department of the United States, did fail and neglect to keep safely said money without loaning, using, depositing in an unauthorized bank, or exchanging for other funds, until said money was ordered by the Postmaster General to be transferred or paid out, as was then and there required of said Rufus B. Smyer by law and by the regulations of the Post Office Department duly made in conformity with law, and did fail to properly account for said sum of money to the post office department as required of him by law, and now still refuses, though demand has been made upon him by the plaintiffs, to account for and pay over to the plaintiffs the said sum of money aforesaid. And the said Rufus B. Smyer did fail and neglect to use and employ said sums of money, collected by and coming into his hands, possession and under his control as aforesaid, for the sale and in the purchase of money orders payable to the respective shippers of the parcel post packages and shipments aforesaid, and did fail to send to the respective shippers of said parcel post packages and shipments aforesaid, the amount of money, in the form of money orders, then and there due to said respective

shippers upon the parcel post packages delivered and caused to be delivered by the said postmaster and upon which said parcel post packages there had come into his official custody and possession and under his control, as such postmaster, the amount of money due upon said packages from the persons to whom said packages were then and there addressed, the said Rufus B. Smyer, as such postmaster, failing, in the manner and form aforesaid, to comply with the conditions of his bond aforesaid and with the laws and regulations pertaining to the post office department, to the great damage of the plaintiffs in the sum aforesaid.

Wherefore plaintiffs demand judgment that they have and recover of and from the defendants, and each of them, the sum of Ten Thousand One Hundred Nineteen Dollars and Eighty-one Cents ($10,119.81), with interest thereon at the rate of eight per cent per annum from December 31, 1921, besides their costs and disbursements herein incurred.

FOURTH COUNT

As a fourth cause of action, the plaintiffs aver and allege as following:

(1) That on, to-wit, the 4th day of February, A.D., 1920, the above-named Rufus B. Smyer was duly appointed postmaster of the United States Post Office at Birmingham, Alabama, and thereafter did duly execute the prescribed oath of office and did duly qualify as such postmaster, and thereupon entered upon the discharge of his duties as said postmaster.

(2) That on, to-wit, the tenth day of February, 1920, defendants the Rufus B. Smyer and the United States Fidelity and Guaranty Company, a corporation, did execute and deliver to the plaintiffs a certain bond, as required by Section 3834 of the Revised Statutes of

the United States, which said bond was duly accepted by the Postmaster General of the United States, as required by law, since which date of the acceptance of said bond by said postmaster general said bond had been in force and effect, binding upon the parties thereto, and said bond aforesaid was in force and effect during all the times mentioned in this count of this complaint, and now still remains in full force and effect; that a copy of said bond is set forth in count one of this complaint and said bond, as so set forth and made a part of count one of this complaint, is hereby adopted and made a part of this count of this complaint.

(3) That in and by the terms and conditions of said bond it is provided, among other covenants, that "if the said Rufus B. Smyer shall faithfully discharge all duties and trusts imposed on him by law and by the regulations of the Post Office Department, and shall perform all duties as fiscal agent of the Government imposed on him by law or by regulation of the Treasury Department made in conformity with law, * * * then this obligation shall be void; otherwise, of force."

(4) That it was then and there and at all the times mentioned in this count of this complaint the duty of the said Rufus B. Smyer, as such postmaster, to keep safely, without loaning, using, depositing in any unauthorized bank, or exchanging for other funds, all the public money collected by him or which came into his possession, until said money was ordered by the postmaster general to be transferred or paid out, and it was then and there the duty of said Rufus B. Smyer, as such postmaster, to properly account for all moneys, funds, and especially money order funds and postal funds in any wise coming into his official custody, possession and under his control, and further it was the duty of the said Rufus B.

Smyer, as such postmaster, to issue post office money orders and pay post office money orders, and faithfully discharge the duties required of him in connection with the conduct of the money-order office of the said post-office.

(5) That during the period of time between the first day of July, 1921, and December 31, 1921, large sums of money were received into the official custody, possession and under the control of the said Rufus B. Smyer, as such postmaster, in connection with the operation and conduct of the money order office of the said post office.

(6) That during the months of August, September, October, November and December of the year 1921, divers and sundry sums of money were received by the said Rufus B. Smyer into his official custody, possession and under his control as such postmaster from divers and sundry persons, such divers and sundry sums of money being so received by the said Rufus B. Smyer, as such postmaster, for the sale of money-orders, including fees collected thereon for the issuance of said money orders; that on, to-wit, the 31st day of December, A.D., 1921, the total of such moneys and funds collected by him and which had come into his official custody, possession and under his control during the months of August, September, October, November and December, 1921, amounted to the sum and value of Ten Thousand One Hundred Ninenteen Dollars and Eighty-one Cents ($10,119.81), all of which sum of money had been received by him, as aforesaid, for the sale of money-orders, and it became and was the duty of the said Rufus B. Smyer, as such postmaster, to use and employ said sum of money, as same was collected, in the issuance of money-orders, and to account for the same to the post office department; that said funds and moneys received by him and into his official custody as such postmaster for the sale of

money orders became money order funds and the property of the post office department of the United States, *and it became and was and is the duty of the* said postmaster to account to the post office department and the United States for all such funds and moneys received and collected by him.

(7) That the condition of the said bond aforesaid was breached in this, that is to say, that the said Rufus B. Smyer, as such postmaster, so having collected and received into his official custody, possession and under his control the said sum of Ten Thousand One Hundred Nineteen Dollars and Eighty-one Cents ($10,119.81), as aforesaid, and in the manner and form aforesaid, did fail and neglect to keep safely said funds and moneys, same being public money collected by him as and in the manner and form aforesaid, until same were ordered by the postmaster general to be transferred or paid out, and did fail to account to the post office department and the United States of America for said large sum of money, and did not use said funds and money in the manner required of him by law, and did not issue or caused to be issued therefor money orders as required by law and the regulations of the post office, all of said funds being public funds, the property of the Post Office Department of the United States and of the United States, to the damage and loss of the United States of America in the sum of $10,119.81, aforesaid.

(8) That by reason of the foregoing facts and premises there is due and owing to the plaintiffs from the defendants, and each of them, the sum of Ten Thousand One Hundred Nineteen Dollars and Eighty-one Cents ($10,119.81), with interest thereon from December 31, 1921, at the rate of eight per cent per annum, no part of which has been paid, although payment thereof has been

duly demanded of the defendants and each of th

Wherefore, plaintiffs demand judgment that they have and recover of and from the defendants, and each of them, the sum of Ten Thousand One Hundred Nineteen Dollars and Eighty-one Cents ($10,119.81), with interest thereon at the rate of eight per cent per annum from December 31, 1921, besides their costs and disbursements herein incurred.

(Count 5 Omitted.)

C. B. KENNAMER,
United States Attorney.

MARSHAL'S RETURN

I have executed the within summons and complaint by handing a copy thereof to Rufus B. Smyer, in person. I have further executed the same on the United States Fidelity and Guaranty Co., a corporation, by handing a copy thereof to Ed S. Moore, as attorney in fact for said United States Fidelity and Guaranty Co.

This the 7th day of July, 1924.

THOS. J. KENNAMER,
United States Marshal.
By Robt. A. Morris, *Deputy.*

DEMURRERS OF R. B. SMYER

Filed August 18, 1924
CHAS. J. ALLISON, CLERK

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

United States of America, *Plaintiffs,* vs. Rufus B. Smyer, and United States Fidelity and Guaranty Company, a corporation, *Defendants.*	At Law. No. 2980.

Comes Rufus B. Smyer, one of the defendants in the above stated cause, and demurs severally and separately to the several counts in the complaint, and assigns the following grounds of demurrer

TO COUNT 1

1. The allegations of this count are insufficient to show a breach of the bond.

2. The allegations are insufficient to show that Rufus B. Smyer, as postmaster, has violated any statute of the United States, or any rules or regulations of the post office department, promulgated pursuant to law.

3. The allegations are insufficient to show that the money alleged to have been received was public money.

4. The allegations fail to show from whom, or when, or on what account, or from what source the defendant postmaster received the money alleged to have been received for the sale of money orders, or the amount

received from each applicant for purchase of money orders.

5. There are no allegations sufficient to show that the defendant Smyer as postmaster has not accounted for, as required by law and the rules and regulations of the post office department, all money received by him as postmaster for money orders issued by him as postmaster.

6. There are no allegations sufficient to show that the defendant Smyer as postmaster has refused or failed to issue money orders for any money paid to him by any applicant for the purchase of money orders in conformity with and as required by law, and the rules and regulations of the post office department.

7. There are no allegations sufficient to show that the money alleged to have been received by the defendant postmaster was received in such manner and way as to authorize the defendant postmaster under and in conformity with law and or the rules and regulations of the post office department, to sell and issue money orders therefor.

8. There are no allegations sufficient to show that the money alleged to have been received by defendant Smyer as postmaster was received in such manner and way as conforms to the requirements of law, and, or, the rules and regulations of the postoffice department requiring application to be made and filed with, and legal tender currency to be paid to the postmaster before sale and issue of money orders.

9. There are no allegations to show that application for purchase and issuance of money orders were made and filed with defendant Smyer as postmaster contemporaneous with the receipt of money alleged to have been received by him.

10. There are no allegations to show that money orders were issued for the money alleged to have been received, or any part thereof.

11. There are no allegations sufficient to show whether the money alleged to have been received by the defendant Smyer as postmaster was actually received by him or whether the money was only constructively received by him in his official capacity.

12. There are no allegations to show that the money alleged to have been received for the sale of money orders, was paid to or received by a proper official or clerk of the finance or money order department of the postoffice at Birmingham, Alabama, for the issuance of money orders, or on proper application as required by the rules and regulations of the post office department.

13. There are no allegations to show who, if anyone, made application for or paid to the proper clerk or official, or what clerk or official, for the issuance of money orders.

14. The allegations are insufficient to show that the defendant Smyer, as postmaster was accountable for or was required by law to pay over the money alleged to have been received.

15. The averment that the funds alleged to have been received by the defendant Smyer as postmaster, were public funds, is a conclusion of law.

* * *

The defendant, Rufus B. Smyer demurs

TO COUNT 2

And assigns the same grounds of demurrers assigned to Count 1, and

* * *

Demurs

TO COUNT 3

And assigns the same grounds of demurrer to this count as assigned to Count 1, and additional grounds of demurrer as follows:

16. The allegations show that the money alleged to have been received was received from collection on C.O.D. parcel post mail, and that the money so received was not money belonging to the United States, and was not public money.

17. The allegations show that the money alleged to have been received was collection on delivery of C.O.D. parcel post mail, and if received in conformity with the rules and regulations of the post office department was received by a subemployee of the plaintiff, working in the post office at Birmingham, and was not received by the defendant postmaster, and there is no averment that money was received in violation of the rules and regulations of the post office department.

18. There are no averments to show from whom, or for whom, or when, or in what amounts this money alleged to have been received was received.

19. There are no allegations to show that the defendant Smyer personally and physically received the money alleged to have been received.

20. There are no averments to show that the defendant Smyer, if he did not personally and physically receive the money alleged to have been received was in his official capacity and under his bond liable or accountable for the money received.

21. There are no averments sufficient to show that the money alleged to have been received as collections on delivery of C.O.D. parcel post mail was delivered or turned over to finance department with application for money order or orders as required by the regulations and

no averments to show that the defendant Smyer as postmaster and on his official bond, was under obligation to issue money orders and or account for the money alleged to have been received, and

* * *

Demurs,

TO COUNT 4

And assigns the same grounds of demurrer to this count as assigned to Count 1, and additional grounds of demurrer as follows:

22. The averments are that the money alleged to have been received by the defendant Smyer as postmaster was received in connection with the operation and conduct of the money order office of the post office at Birmingham, but there is no averment to show that the money was received by the proper clerk or official in legal tender currency, and on written application as required by the rules and regulations of the post office department.

23. There are no averments to show from whom, or when application for money orders were made, or in what amounts money was paid for money orders to the proper clerk or officials of the money order department.

24. There are no averments to show from what source, and by whom, and when, or in what amounts the money alleged to have been received was received by the defendant, and no averments of fact to show that the money alleged to have been received was money received in connection with the operation and conduct of the money order department of the postoffice.

25. The allegation that the money alleged to have been received was received by the defendant, "In connection with the operation and conduct of the money order office of said post office" is a conclusion of law, with no

allegation of fact to show that the money alleged to have been received was in fact received in connection with the operation and conduct of the money order department of the post office in accordance with the rules and regulations of the post office department, and,

* * *

Demurs

TO COUNT 5

And assigns the same grounds of demurrer assigned to Count 1 and the same grounds of demurrer assigned to Count 3, and additional grounds of demurrer as follows:

26. The averments show that the money alleged to have been received was rightfully received by John A. Smith in his capacity as superintendent of mails as a result of collection made by him, or under his supervision on delivery of C.O.D. parcel post packages, and that said Smith embezzled the money so received, and there are no averments to show that the defendant R. B. Smyer or his official bond is liable or responsible for the money so alleged to have been received and embezzled by Smith.

27. The averments show that the defendant Smyer and his official bond was not liable or responsible for the money alleged to have been received and embezzled by John A. Smith.

28. There are no averments of fact to show that the defendant R. B. Smyer was negligent.

29. There are no averments to show from whom, when, or at what time letters of inquiry were written to defendant Smyer by shipper or that he ever received such letters.

30. There are no averments to show that the letters of inquiry alleged to have been written to the defendant

were received before or after the alleged embezzlement by Smith.

31. There are no averments to show that the alleged embezzlement had not occurred prior to the alleged writing of letters by shippers to the defendant Smyer.

32. There are no averments to show that the defendant Smyer violated any law, or rules or regulations of the defendant.

33. The allegation that the defendant Smyer made no proper investigation into the conduct of said John A. Smith is a conclusion of pleader. And there are no allegations of fact as to what investigation the defendant did make.

34. There is no allegation sufficient to show that if the defendant Smyer had made a proper investigation, or if he had referred to letters of inquiry, that the alleged embezzlement by Smith would have been prevented, and no allegation to show that the embezzlement alleged had not already occurred.

E. J. SMYER,
Atty for defendant R. B. Smyer.

DEMURRERS OF UNITED STATES FIDELITY AND GUARANTY CO.

Filed August 27, 1924
CHAS. J. ALLISON, CLERK

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

United States of America, *Plaintiffs,* vs. Rufus B. Smyer, and United States Fidelity and Guaranty Company, a corporation, *Defendants.*	At Law. No. 2980

Comes the United States Fidelity and Guaranty Company, one of the defendants in the above styled cause, and demurs separately and severally to the several counts of the complaint and assigns as grounds of demurrer to each count the same grounds assigned by the defendant, R. B. Smyer, to the several counts.

B. F. SMITH,
Attorney for the United States Fidelity and Guaranty Company.

AMENDMENT TO COMPLAINT

Filed August 25, 1924
CHAS. J. ALLISON, CLERK

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

United States of America, *Plaintiffs,* vs. Rufus B. Smyer, and United States Fidelity and Guaranty Company, a corporation, *Defendants.*	At Law. No. 2980

The United States of America, plaintiffs herein, appearing by their duly authorized attorney, C. B. Kennamer, in and for the Northern District of Alabama, by leave of the court first had and obtained, amend their complaint heretofore filed in this cause, as follows, separately and severally:

(1) By striking out of each count of said complaint, as originally filed, the words and figures "Ten Thousand One Hundred Nineteen Dollars and Eighty-one Cents ($10,119.81)" wherever said words and figures appear in each count of said complaint, and inserting in lieu thereof the following words and figures, "to-wit, Ten Thousand One Hundred and Fifty-one dollars and ninety-one cents, ($10,151.91)" thereby making the claim and demand of the plaintiffs the sum of, to-wit, $10,151.91.

(2) By inserting in the first count of said complaint an additional paragraph to be known as paragraph (4½) which said paragraph will be inserted in said complaint immediately preceding paragraph number (5)

thereof, and by inserting in the second count of said complaint an additional paragraph to be known and designated as paragraph number (2½) thereof, which said additional paragraph will be inserted in said complaint and count thereof immediately preceding paragraph numbered (3) thereof; and by inserting in the third count of said complaint an additional paragraph to be inserted in said count immediately preceding the last paragraph thereof; and by inserting in the fourth count of said complaint an additional paragraph to be known and designated as number (5½) to be inserted in said count immediately preceding paragraph number (6) thereof; the additional paragraph to be inserted in each of said counts as herein stated, being as follows:

"That the said divers and sundry sums of money received by the said Rufus B. Smyer, as such postmaster, as herein stated, and the dates when same were so received, the persons from whom same were received, and the senders of such packages of mail matter, and the names of the persons to whom money order should have been issued, as aforesaid, being hereinafter set forth in count six of this complaint, as amended, the said data herein mentioned as so set forth in count six of this amended complaint being hereby adopted and made a part of this count of this complaint."

(3) By adding to the original complaint filed herein an additional count to be known and designated as Sixth Count, said Sixth Count being in words and figures as follows:

SIXTH COUNT

As a sixth cause of action, the plaintiffs aver and allege and complain as following:

The plaintiffs adopt all the words, figures, and letters contained in the fourth count of this complaint down

to and including paragraph number three (3) of said fourth count hereof, and in addition thereto submits and adds thereto the following paragraphs:

(4) That it was then and there and at all the times mentioned in this count of this complaint the duty, under the law and the rules and regulations of the post office department of the United States, of the said Rufus B. Smyer, as such postmaster, to properly account for all money received by him for the sale of money orders at and from the said post office at Birmingham, Alabama, and all public and money order funds and all moneys in any wise received by and coming into his official custody, possession, and under his control, by virtue of his office and employment as such postmaster aforesaid, and likewise it was the duty of the said Rufus B. Smyer, as such postmaster, to receive into his possession and custody and under his control collect-on-delivery parcel post packages of mail matter addressed to patrons of said post-office and persons receiving mail from said post-office, and to make delivery thereof to the respective addresses thereof, which said packages of mail matter had been sent by the senders thereof collect-on-delivery, and it was likewise the duty of the said Rufus B. Smyer, as such postmaster, upon the addressee of such a package of mail matter paying to him, as such postmaster, all collect-on-delivery charges on such package, including a fee for issuance of a money-order for the amount of said charges, to deliver such package to the addressee thereof, and at the time of such delivery thereof to such addressee thereof to receive from the said addressee of such package the signed receipt by and from such addressee of such package for said package, which said receipt would be on a form prepared and issued by the post office department for that purpose, in pursuance of the rules and regula-

tions of the post office department, which said signed receipt then and there became and was the application of the person signing the same, to-wit, the addressee of such package of mail matter aforesaid, for a money-order for the amount of the collect-on-delivery charges due to the sender of such package, which charges were then and there paid to the said postmaster, whereupon it became and was the duty of the said Rufus B. Smyer, as such postmaster, upon him so receiving from the addressee of such package the collect-on-delivery charges stated thereon to be due to the sender of such package, and upon the said addressee so signing the aforesaid receipt for said package of mail matter, to issue and cause to be issued at and by the post office of the United States at Birmingham, Alabama, a money-order payable to the sender of that particular package of mail matter, said money-order to be issued for a sum equal to the amount of the collect-on-delivery charges collected thereon as aforesaid, and said money-order to be stamped "C.O.D" and mailed by said postmaster to the sender of such package in a penalty envelope, and to enter on the aforesaid receipt, commonly called, to-wit, "the receipted tag" the number of the money order, the amount and date of issue, and thereupon to file such receipt with other money order applications at and of said post office, the said money order aforesaid to be drawn and issued immediately after the delivery of such parcel of mail matter aforesaid, not later than the day following the delivery of such parcel of mail matter, and in all such matters relating to the delivery of collect-on-delivery parcels of mail matter to faithfully discharge the duties required of him by law and the rules and regulations of the post office department.

(5) That the condition of the aforesaid bond has

been breached by the defendants in divers, to-wit, the various and sundry instances hereinafter more particularly set forth, in this, that is to say, that at divers and sundry times and dates, the particular dates and times being hereinafter set forth and mentioned, the said Rufus B. Smyer, as such postmaster aforesaid, did receive into his hands, possession, and under his control and supervision, by virtue of his said office and employment as such postmaster aforesaid, divers and sundry sums of money, the exact amount and sum of money received in each instance being hereinafter particularly mentioned, for the sale of divers and sundry money orders, including money as fees for issuance of such money orders, the said divers and sundry sums of money being and amounting to the sum and value of to-wit Ten Thousand One Hundred Fifty-one Dollars and Ninety-one Cents ($10,151.91), the same being public money and funds of the United States, that is to say, that on each of the following dates and dates hereinafter specifically set forth, the said Rufus B. Smyer, as such postmaster, did receive into his hands, possession, custody and under his supervision, for delivery to the addresses thereon, whose names are hereinafter specifically set forth in that behalf, the various and sundry hereinafter described collect-on-delivery parcels of mail matter, and did on the dates hereinafter mentioned, deliver said packages of mail matter to the addresses herein set forth, and at the time of so delivering said packages to said addresses did receive from said addressees the hereinafter described recepits, commonly known as receipted tags, which by and under the rules and regulations of the post office department contemporaneously with the receipt thereof by said postmaster became and were applications for money orders, and likewise did receive as such postmaster from

such addressees the hereinafter specific sums of money, which said moneys he was then and there required to use in the issuance of money orders, payable to the hereinafter mentioned senders of such collect-on-delivery parcels of mail matters, which said money orders were to and should have been drawn and issued at the post office of the United States at Birmingham, Alabama, payable as aforesaid, immediately after the delivery of the particular package in question and the receipt by the said postmaster of the particular sum of money mentioned, the date of each of said packages, the name of the sender thereof, the amount of collect-on-delivery charges due thereon and then and there paid to and received by the said Rufus B. Smyer, as such postmaster, as aforesaid, the name of the addressee of each of said packages of mail matter, the amount of fees due on and for issuance of a money order as to each of said packages for the said charges due and paid thereon, and the post office at and from which each of said packages had theretofore been mailed, being as follows, that is to say:

(List omitted by agreement.)

and the said Rufus B. Smyer, as such postmaster, so having, on the divers and sundry dates aforesaid, received into his hands, possession and under his control and supervision, under and by virtue of his office and employment as such postmaster aforesaid, the divers and sundry sums of money aforesaid, being in the total sum and value of, to-wit, Ten Thousand One Hundred Fifty-one Dollars and Ninety-one Cents($10,151.91) aforesaid, did then and there fail to faithfully discharge all the duties and trusts imposed on him, as such postmaster aforesaid, the said defendants herein being then and there accountable upon the official bond aforesaid for all moneys received by the said postmaster and his assist-

ants and clerks so receiving the same for the sale of money orders and for all moneys which came into the hands of the said postmaster and the hands of his assistants and clerks aforesaid, or which might be placed in their custody by reason of the transaction by them of money-order business, and did fail to perform all duties as fiscal agent of the Government imposed on him as such postmaster by law or by regulation of the Treasury Department made in conformity with law, as in said bond aforesaid was then and there required of him and his said surety, in this, that the said Rufus B. Smyer, as such postmaster aforesaid, so having received into his hands, possession and under his control and supervision, as aforesaid, the said divers and sundry sums of money aforesaid, did, at and on the divers and sundry dates and times mentioned herein, fail to issue and cause to be issued money orders payable to the respective senders of the aforesaid collect-on-delivery parcels of mail matter, and stamp each of said money orders "C.O.D" and mail each of same to the respective senders of such packages of mail matter in a penalty envelope, and did not use said moneys and funds in the manner required of him by law and the rules and regulations of the Post Office Department, and did fail to account, as required by law, to the Post Office Department of the United States for said divers and sundry sums of money aforesaid, of the value aforesaid, all of which said divers and sundry sums of money aforesaid, in the total amount and value of, to-wit, $10,151.91, as aforesaid, being public funds, the property of the Post Office Department of the United States, the same having been received into the hands, possession, custody and under the supervision of the said Rufus B. Smyer, in his official capacity as postmaster for the Post Office of the United States at Birmingham, Ala-

bama, aforesaid, under and in pursuant to the law and the rules and regulations of the Post Office Department, for the sale of money orders and for fees for issuance of money orders, as aforesaid, the said postmaster and his surety aforesaid then and there by law being held accountable upon his official bond for all moneys received by him and his assistants and clerks duly authorized to so receive the same for the sale of money orders and for all moneys coming into the hands and official custody and under the supervision of the said Rufus B. Smyer, as such postmaster, by reason of the transaction of money-order business, all to the great damage and loss to and of the United States of America, plaintiffs herein, in the sum of, to-wit, $10,151.91, aforesaid.

(6) That, before the commencement of this suit, the plaintiffs herein, through their duly authorized agents, have demanded of the defendants the payment of the amount and value of money sued for and claimed herein, and the defendants have refused, failed and still refuse and fail to comply with the just demands of the plaintiffs in that behalf.

(7) That by reason of the foregoing facts and premises there is due and owing to the plaintiffs from the defendants above named, and each of them, the sum of, to-wit, $10,151.91, with interest thereon, no part of which has been paid by the defendants.

Wherefore, the plaintiffs herein demand judgment that they have and recover of and from the defendants herein, and each of them, the sum of, to-wit, Ten Thousand One Hundred Fifty-one Dollars and Ninety-one Cents ($10,151.91) with interest thereon, besides their costs and disbursements herein incurred.

C. B. KENNAMER,
United States Attorney.

Leave of court is hereby granted to file this amendment to the complaint in this cause, good cause being shown to the court for filing thereof.

This the 25th day of August, 1924.

W. I. GRUBB, *District Judge.*

I have executed the within writ in the following manner, to-wit:

On Rufus B. Smyer, by handing a copy thereof to E. J. Smyer, attorney for said Rufus B. Smyer, at the office of the said E. J. Smyer, in the Title Guaranty Loan & Trust Building in the City of Birmingham.

On the United States Fidelity & Guaranty Co., a corporation, by handing a copy thereof to Ed S. Moore, the atty in fact for said corporation, at his office in the City of Birmingham.

This the 27 day of August 1924

THOS. J. KENNAMER,
United States Marshal
By JOHN T. STEWART,
Deputy.

Returned and filed 8-28-24.

CHAS. J. ALLISON, *Clerk.*

DEMURRER OF R. B. SMYER TO AMENDED COMPLAINT

Filed Sept. 8, 1924
CHAS. J. ALLISON, CLERK

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

United States of America, *Plaintiff.* vs. Rufus B. Smyer, and United States Fidelity and Guaranty Company, a corporation, *Defendants.*	At Law. No. 2980.

Comes Rufus B. Smyer, one of the defendants in the above stated cause, and demurs severally and separately to the several counts in the complaint as amended and sets down and assigns to each of the several counts the same grounds of demurrer heretofore assigned to each of the respective counts prior to the amendment, except that the defendant strikes out the fourth ground of demurrer assigned to count one and by adoption assigned respectively to counts 2, 3, 4 and 5.

And this defendant demurs to count No. 6 of the complaint added by amendment and assigning to it the same grounds of demurrer as assigned to count three, striking out the ground numbered eighteen.

E. J. SMYER, *Atty for Deft.*

DEMURRER OF UNITED STATES TO COMPLAINT AS AMENDED FIDELITY AND GUARANTY CO.

Filed Sept. 11, 1924
CHAS. J. ALLISON, CLERK

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

United States of America, *Plaintiff,*
vs.
Rufus B. Smyer, and United States Fidelity and Guaranty Company, a corporation, *Defendants.*
at Law.
No. 2980.

Comes the defendant, United States Fidelity and Guaranty Company, one of the defendants in the above stated cause, and demurs severally and separately to the several counts in the complaint as amended and sets down and assigns the same grounds of demurrer to each of said amended counts as assigned to each of said amended counts by the defendant Rufus B. Smyer, and

This defendant demurs to the sixth count of said complaint added by amending and assigning the same grounds of demurrer to this count as assigned by the defendant Rufus B. Smyer.

B. F. SMITH,
Atty. for United States Fidelity and Guaranty Company.

ADDITIONAL GROUNDS OF DEMURRER BY R. B. SMYER

Filed November 1, 1924
CHAS. J. ALLISON, CLERK

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

United States of America, *Plaintiff,* vs. Rufus B. Smyer, and United States Fidelity and Guaranty Company, a corporation, *Defendants.*	At Law. No. 2980.

Comes defendant, Rufus B. Smyer, one of the defendants in the above stated cause, and by leave of the court sets down and assigns as additional grounds of demurrer, to Count 1, as amended, and to count 2 as amended and to count 4 as amended respectively the same grounds of demurrer assigned to original count 3 numbered 16 to 21 inclusive.

E. J. SMYER,
Atty. for Defendant.

ADDITIONAL GROUNDS OF DEMURRER BY UNITED STATES FIDELITY AND GUARANTY CO.

Filed November 1, 1924
CHAS. J. ALLISON, CLERK

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

United States of America, *Plaintiff*, vs. Rufus B. Smyer, and United States Fidelity and Guaranty Company, a corporation, *Defendants.*	At Law. No. 2980.

Comes the defendant United States Fidelity and Guaranty Company, one of the defendants in the above stated cause and by leave of the court sets down and assigns as additional grounds of demurrer, to count 1 as amended and to count 2 as amended and to count 4 as amended, respectively the same grounds of demurrer assigned to original count 3 numbered 16 to 21 inclusive.

B. F. SMITH,
Atty. for U. S. F. & G. Co.

AMENDMENT TO COMPLAINT

Filed November 1, 1924
CHAS. J. ALLISON, CLERK

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

United States of America vs. Rufus B. Smyer, and U. S. Fidelity and Guaranty Company, a corporation.	At Law. Number 2980.

Come the United States of America by C. B. Kennamer, their Attorney in and for the Northern District of Alabama, and by leave of the Court first had and obtained, further amends the original complaint heretofore filed in this cause on July 3rd, 1924, by striking therefrom the Fifth Count of said Complaint.

This the 1st day of November, A. D., 1924.

C. B. KENNAMER,
United States Attorney.

Note: Leave of Court is hereby granted the United States of America to file the above and foregoing amendment.

W. I. GRUBB, *U. S. District Judge.*

WAIVER OF TRIAL BY JURY

Filed Nov. 21, 1924
CHAS. J. ALLISON, CLERK

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

United States of America
vs.
Rufus B. Smyer, and United States Fidelity & Guaranty Company.
Number 2980.

Come parties in the above entitled cause, the United States by C. B. Kennamer, United States Attorney for the Northern District of Alabama, and the defendants by their attorneys of record in this cause, and hereby waive a trial by jury in the above entitled cause, and hereby consent for this cause to be tried by the Court without a jury.

This the 21st day of November, 1924.

C. B. KENNAMER,
United States Attorney.

R. B. SMYER,
Attorney for Rufus B. Smyer.

B. F. SMITH,
Attorney for United States Fidelity & Guaranty Company.

STIPULATION OF PARTIES AS TO FACTS

Filed November 24, 1924
CHAS. J. ALLISON, CLERK

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

United States of America, *Plaintiffs*, vs. Rufus B. Smyer, and United States Fidelity and Guaranty Company,	*Defendants.* No. 2980. At Law.

STIPULATION OF PARTIES AS TO FACTS IN CASE

The United States of America, plaintiffs, and the defendants, Rufus B. Smyer, and the United States Fidelity & Guaranty Company, a corporation, defendants in the above entitled cause, hereby mutually enter into this contract, agreement and stipulation as to the facts involved in the above entitled cause.

(1) It is agreed by the parties that the case shall be tried by the court without a jury, trial by jury having heretofore been expressly waived in writing, and being likewise hereby waived.

(2) It is agreed that this statement of facts and any part of same, and any part or portion of the statements contained herein shall be admitted, subject to any legal objections on the part of either of said parties, that is, said statement is prepared with the right on the part of either of the parties to the same to interpose any legal

objections to any part of said statements, which would be subject to legal objection in the event the evidence were being adduced by witnesses on the stand, and that any statement or statements which may be deemed incompetent, illegal, irrelevant, or immaterial to the issues involved in this litigation, may be disregarded by the court as though said statements were not incorporated herein.

(3) The defendant, Rufus B. Smyer, was Postmaster of the Post Office at Birmingham, in the Northern District of Alabama, Southern Division thereof, continuously from January 6th, 1916, to his term of office expired on February 4, 1924, and that he continued in said office as such postmaster after the said 4th day of February, 1924, until and including the 20th day of August, 1924, his successor not having been appointed and duly qualified until the 21st day of August, 1924; that the defendants entered into and executed the bond and writing obligatory sued on and set forth and described in count one of the complaint, and that said bond was accepted by the Postmaster General of the United States as set forth in count one of the complaint, that is, said bond was accepted by the postmaster general March 2nd, 1920, by J. C. Koons, then First Assistant Postmaster General, the defendants having executed said bond on the 10th day of February, 1920; that said bond was in full force and effect during all the period of time mentioned and set forth in the complaint in this cause, the defendant, Rufus B. Smyer, having duly paid to the defendant, United States Fidelity and Guaranty Company, a corporation, the premium due on said bond each year, said premium being due and payable in advance.

(4) That John A. Smith was an employee of the United States in the post office at Birmingham, Ala-

bama, when the said Rufus B. Smyer was first appointed Postmaster, and held the position and discharged the duties of foreman in the parcel post section of said post office at that time, and continued to hold that position in the office until May 16, 1921, when he was promoted to the position of Assistant Superintendent of Mails; that as foreman of the parcel post section he handled all parcel post mail matter in the main office at Birmingham, and that during the time he was Assistant Superintendent of Mails he handled and had charge of the parcel post mail matter in said main office, and in addition thereto, as Assistant Superintendent of Mails, the said John A. Smith performed other duties; that said Smith was discharged from the service during the early part of 1922, but did not perform any duties in the said office subsequent to the latter part of November, 1921.

(5) That the said John A. Smith was considered by the Postmaster competent and well qualified for the position of Assistant Superintendent of Mails, which position he held, and up to the time of the discovery of his defalcation was of good reputation; that after becoming Assistant Superintendent of Mails the said John A. Smith continued to discharge the same duties in the post office in regard to parcel post mail and collect on delivery packages of mail matter that he had been discharging as Foreman of the parcel post section prior to that time, but in addition thereto discharged other duties; that on May 1st, 1921, the Superintendent of Mails in the Birmingham post office was removed from office by the Post Office Department, and there was a vacancy in that position from May 1st, 1921, until the 1st day of September, 1921, when James C. Puckett was appointed by the proper officials of the Post Office Department to fill the position of Superintendent of Mails, and said

Puckett held that position and discharged the duties thereof until sometime in the year 1923; that during the period when said bond sued on herein was in force and effect there was also in said post office, one Assistant Postmaster, one Superintendent of Mails, and three Assistant Superintendents of Mails, and about twenty additional supervisory officers, and about three hundred and seventy clerks and employees, which includes approximately 120 carriers who deliver C. O. D. mail on their routes; that John A. Smith however was the only Assistant Superintendent of Mails handling and in charge of parcel post mail matter; that all officers and employees of said post office were subordinates under the postmaster and as such subordinates were subject to the direction and control of said postmaster; that the said John A. Smith held his position under the civil service law and rules and regulations of the United States, and the postmaster had no authority to discharge or remove him from office or his position, except upon order of the Department, his only recourse being to file and sustain charges against him under the civil service law and as provided therein.

(6) That at the time Rufus B. Smyer first became postmaster the Birmingham post office was a first class office and was operated under the two division plan by order of the Department, that is, the post office was divided into what was known as the Finance Department and the Department of Mails, and said post office has continued up to the present time to be operated on such plan. The parcel post mail, including collect on delivery parcel post mail matter, was handled in the division of mails, and the money order business was handled in the division of finance. In regard to collect on delivery post mail Smith's duties were the same as they were and had

been while he was foreman of the parcel post section.

(7) The said John A. Smith, if introduced as a witness in this cause, would testify: That on May 16, 1921, he was promoted from the position of foreman of the parcel post section in the Birmingham post office, main office thereof, to the position of Assistant Superintendent of Mails, and that he held the position of Assistant Superintendent of Mails until his separation from the service; that as Assistant Superintendent of Mails, it was a part of his duties, subject to the supervision, direction and control of the postmaster, to receive into his custody parcel post mail, including collect on delivery packages of parcel post mail, and to deliver at the windows and caused to be delivered at the windows by other employees and cause to be delivered by rural and city carriers such packages of parcel post mail, and also his duty to collect and cause to be collected from the addressees of all collect on delivery parcel post packages the amount of money set forth on the tags attached to such packages as being due to the senders of such packages, and to also collect from the addressees of such packages an amount of money sufficient to purchase a money order payable to the sender of that particular package, as was then provided by the rules and regulations of the post office department; that during the time the said Smith was Assistant Superintendent of Mails there was received at and by the Birmingham, Alabama, post office, the various and sundry packages of collect on delivery parcel post mail described and set forth in the complaint as amended, and that said packages of mail matter were delivered from and through the main office of the said post office at Birmingham, Alabama, by the said Smith and by carriers and employees, and that all moneys were either received directly by the said Smith or turned over

to him by the delivering employees, who had actually delivered to the addressees said packages; that each of said addressees signed the receipted tag attached to that particular package at the time of receiving the same, and all such tags were received by or turned over to said Smth, together with the amount of money collected; that it was the duty of said Smith, after receiving said money into his possession to carry the same, together with the receipted tags, to the money order department or division of said post office, and there purchase and cause to be issued by that department money orders payable to the senders of said packages; that it was the duty of said Smith to have issued these money orders not later than the day following the actual delivery of said packages and the actual collection by him of said moneys received by him on delivery of said packages; that the said Smith was likewise required to deliver to the money order department of said post office the money order fees collected by him from the addressees of said packages, and the persons who had receipted said tags attached to said packages, which fees were to be used in payment of money orders purchased, said money orders to be payable to the senders of said packages; that during the months of August, September, October and November of 1921 and during the entire time that his embezzlement was carried on, the said Smith embezzled comparatively only a small portion of the collections made by him and during all of the time that he was carrying on his embezzlements he legitimately used by far the major part of his collections as it was his duty to do by paying over the money collected with the tags to the money order clerk for money orders to be issued to the respective shippers or senders of such packages, together with the fees incident thereto; that during said period of time, that is,

during August, September, October and November, of 1921, money orders were issued from the main or Birmingham post office aggregating approximately $25,000 each month, and approximately 3500 tags each of these months were filed with the money order department of said office as applications for these money orders together with money therefor in payment of collect on delivery parcel post collections through the main office at Birmingham, Alabama. That Smith was in charge of all collect on delivery parcel post mail which passed through the post office or main office at Birmingham, Alabama, subject to the supervision of the postmaster, and that the collections which said Smith made were only the collect on delivery parcels delivered by carriers and employees through the windows at the main office; that all collect on delivery parcel post packages passing through the main or Birmingham office which were distributed or sent or delivered to sub-stations connected with the said office were delivered by the carriers of those stations and collections made by the carriers or through the windows of such stations and money orders were issued for these packages on these collections direct from the station office and reports made to the main office or Birmingham office; that Smith handled none of such funds collected or sent through these substations.

The form of the parcel post tags used on C. O. D. parcel post mail matter and all rules and regulations of the department pertaining to C. O. D. parcel post mail matter are to be considered as if duly and regularly introduced in evidence, if introduction in evidence be deemed necessary in regard thereto.

That during the months of August, September, October, and November, 1921, from the moneys collected by the said Smith, he delivered to the money order de-

partment in the Finance Division of said Post Office, a large amount of money collected together with fees incident thereto and turned over to said Department the tags pertaining to the various parcels, so that the money order department could issue and remit money orders to the respective parties entitled thereto. That in many instances the said John A. Smith, instead of delivering the tags and money and fees collected on the delivery of parcel post packages, appropriated the same to his own use. That when the said John A. Smith appropriated moneys so collected by him to his own use, he placed the receipted tag in his private locker, the said John A. Smith being the only person having a key to such locker. That on or about December 31st, 1921, M. O. Detlie and S. L. Robinette, Post Office Inspectors, in the presence of James C. Puckett, Superintendent of Mails, entered the locker of said John A. Smith and found therein 1560 collect on delivery parcel post tags, each of which tags had been receipted by the respective addressee of such tag. That a computation by said Inspectors of the amount of money shown by these tags amounts in the aggregate to the sum of $9,901.96, which sum of money embraces and includes the money order fees collected by said John A. Smith. That said John A. Smith then admitted and would now testify that he embezzled all of the moneys mentioned on said tags and appropriated the same to his own use. Said John A. Smith would further testify that so far as he knows, no one save himself knew that he was embezzling this money. The said John A. Smith would further testify that each of said tags, after same had been signed by the addressee of said tag, was considered by the Post Office Department as said addressee's application for money order payable to the person, firm, or corporation set forth on said tag as the

sender of that particular package. That said Smith commenced the embezzlement of such funds sometime prior to August, 1921, and that he carried on this embezzlement by what is known as kiting, that is, when he embezzled the collections from a package, he would preserve the tag in his private locker, instead of that day or the day following causing a money order to be issued on said tag, and subsequently would use money collected from other parcels as a means of procuring money orders to be sent on the shipment or package from which he had previously embezzled the funds collected thereon, and in this way, he was kiting and increasing his shortage and embezzlement as he carried on this process, and neither the Postmaster or anyone else had a key to his private locker. Said John A. Smith would further testify that at the time of his separation from the service, he had embezzled funds collected in the manner set forth above to the sum of $10,151.91. The said Smith would further testify that he had been embezzling funds in the manner as set forth above for a period of about four years, his shortage increasing as time went on.

(8) It is further admitted that during March of 1922, the said John A. Smith was indicted in the District Court at Birmingham for the embezzlement of such funds, and that he entered a plea of guilty to such indictment and was sentenced to serve three years in the Atlanta Penitentiary.

(9) It is further agreed and admitted by the parties hereto that M. O. Detlie and S. L. Robinette, Post Office Inspectors, now have in their possession the identical tags secured by them from the locker of said Smith, but that said tags are not to be introduced and incorporated in the record on appeal in this case, but are to be considered as having been introduced before the Court

on the trial of this cause, and that said tags, as set forth in the several counts of the complaint, show the facts in regard thereto as alleged in the complaint, that is, show the name of the sender, the name of the addressee, the post office at which mailed,the amount of C.O.D. charges due on each package, and the amount of money order fees due on each package, as alleged in the complaint, and said tags shall be treated and construed as in evidence as if duly offered and received in evidence.

(10) It is further agreed and admitted that as to many of said tags and packages of mail matter, claims for indemnity were filed against the Government as provided by law and the rules and regulations of the Post Office Department, and that said Post Office Department has paid indemnity on said claims amounting to the sum of $9,173.45, said payment having been made out of the appropriations for the postal service entitled "Indemnities Domestic Mail," and that payment has been made to rightful and proper claimants. It is further admitted that there was and is due and owing to the United States the sum of $83.66, which represents the aggregate of money order fees, which were collected by said John A. Smith, and which were due and payable for money orders to be sent to the senders of such parcels, and which said fees were collected by said John A. Smith from the addressees of the parcels set forth in the complaint. It is further admitted that the Government would be able to show on the trial of this cause a total shortage or embezzlement on the part of Smith of the sum of $10,151.91. But the Post Office Department has only paid indemnity to the extent of $9,173.45, by reason of the fact that in some instances no claims for indemnity were filed.

(11) It is further agreed that the defendant, Rufus

B. Smyer did not receive into his actual personal possession or custody any of the money embezzled by said John A. Smith.

(12) The defendant Rufus B. Smyer if introduced as a witness in this cause by the defendants would testify in substance, subject of course to any legal objections interposed on behalf of the Government, substantially as follows: That in August, 1920, at a conference held at Washington, called by the Post Office Department, to which Postmasters were invited, and which conference was held for the purpose of bettering the service and hearing suggestions from Postmasters, he criticized the tag system of handling collect on delivery parcel post matter as unsafe and inadequate, and recommended the keeping of records to check and trace the parcel from time of shipment to time money order was issued, and at said conference some postmasters agreed that the tag system was unsafe, at which conference representatives of the Department were present. That while in Washington at this conference, he had an interview with officials of the Department in charge of handling claims in regard to the matter, but was told that the expense of keeping records and check on shipments would cost more than any loss that would be sustained. The witness Rufus B. Smyer would further testify that John A. Smith had a spell of sickness or claimed he was sick, in the latter part of November, 1921, and was absent from his duties. That immediately after said Smith became sick, he, Rufus B. Smyer, as Postmaster directed that all of the mail, which in the ordinary course of business would go to Smith for examination and consideration, should be transferred to his, Rufus B. Smyer's, desk for examination and consideration by the Postmaster. That in the examination of this mail, he found numerous letters

of inquiry or complaint in regard to non-remittances on collect on delivery parcel post packages; that he investigated and could find no tags pertaining to or connected with the numerous complaints; that he investigated as to the C. O. D. parcel post money orders and in some instances found where the money orders had been sent. That after Smith had been absent from the office about a week, Smith came to the office at Smyer's request and he, Smyer, showed Smith the letters of complaint and instructed him to run the matter down and to report results to him. That Smith stayed in and about the office about two days, but his report of investigation and explanation were not satisfactory, and that he, Smyer, as Postmaster notified the Post Office Inspector who was stationed in Birmingham, of the condition and also wrote a letter to the Inspector in Charge, at Chattanooga, Tennessee, explaining the condition and suggesting action by the Inspection Department. Very shortly after this an investigation was begun and Inspectors Robinette and Detlie found the tags hereinabove mentioned, in the private locker of said John A. Smith and immediately had said Smith arrested. That said Smith never performed any duties in the Post Office after he got sick in November, 1921, excepting a part of two days that he was in the office as above stated.

(13) It is further agreed that any and all evidence and statements set forth in this agreed statement which the Court may deem irrelevant, immaterial or incompetent in the hearing of this cause, may be disregarded by the court as if not contained herein.

(14) It is further agreed and admitted that the said Inspectors hereinabove mentioned upon making their investigation found in the desk used by said John A. Smith as Assistant Superintendent of Mails, divers

and sundry letters of complaint from divers and sundry shippers of parcel post matter and also several letters from the Post Office Department referring to various complaints received by the Department at Washington concerning parcel post packages, which had been shipped and no money orders issued by said Post Office to the senders of said packages. That all of these letters were addressed to the Postmaster at Birmingham. It is further admitted that there were only one hundred and twenty-four of such letters, and that there were found in said bundle of letters only four which appeared to have been handled by the postmaster in person, which said letters are described as follows:

(First) Letter from Acting Third Assistant Postmaster General dated March 16, 1921, inclosing duplicate form 3812 with request that same be executed by the postmaster and the addressee covering the receipt or non-receipt of the parcel in question. The letter had marked thereon the following: "Attention please, Smyer, P.M."

(Second) Letter from Third Asst. Postmaster General, dated April 1, 1921, relating to parcel No. 214192, mailed by the L. C. Smith & Bro. Typewriter Co. Atlanta, Ga. addressed to James G. Smith, Birmingham, Alabama. The letter inclosed application for indemnity, and was marked in pencil "Attention" in the handwriting of Smyer.

(Third) Letter dated Oct. 8, 1920, addressed to Postmaster, Birmingham, Ala., from Postmaster at Grand Rapids, Mich., relating to C.O.D. parcel mailed by that office addressed to Ahrens-Rich Auto Co., 200 17th St., Birmingham; in the letter is the following statement: "They (sender of said package) state that the addressee informs them that goods have been received and paid for but to date they have received no remittance covering same.

Will you please investigate and if money order was issued, give number and date." On this letter appeared in pencil in the handwriting of the postmaster: "Attention, Please, Smyer, P.M."

(Fourth) Letter from Third Asst. Postmaster General, dated May 24, 1921, inclosing indemnity papers concerning shipment theretofore made. Attached to said letter is a typewritten memorandum on separate sheet of paper as follows: "Asst. Supt. Mails Smith, For Prompt investigation and report. R. B. Smyer, P.M."

It is further admitted that all mail concerning parcel post matters which was not marked "Personal" or "Attention of Postmaster" was at all times placed on the desk of Smith as Assist. Supt. of Mails; that the volume of mail daily received by the post office at Birmingham, all of which was addressed to the postmaster, was very large, and the only mail placed on the desk of the postmaster was Departmental mail and local complaints and letters marked "Personal" or "Attention of Postmaster." It is further admitted that all of the letters found in the desk of Smith were received by the post office and, with the exception of the four above mentioned, were placed on the desk of Smith by other employees of the postoffice; that some of these letters were dated as far back as in the year 1920, and had never been answered by said Smith; the said Smith, if present, would testify that he received all of said letters and concealed the same in his desk and that same were never answered by him, or any report made to the postmaster concerning same; that the four letters above mentioned and particularly set forth were concealed in his desk and no report made to the postmaster concerning same as requested thereon by the postmaster; he would further tes-

tify that in many instances when he would receive such letters, in order to avoid detection, he would answer the same, and claim that the particular package inquired about had never been received by the post office, or that the matter was being by him investigated, or if same had been received he would cause remittances to be made several months after the packages in question had actually been delivered, and he had actually collected the C. O. D. charges and money order fees thereon. It is further admitted that the said Smith was required, subject to the direction and control of the postmaster, to use all C. O. D. charges collected by him and all money order fees collected by him, in purchasing from and at and causing to be issued by the Birmingham, Alabama, post office money orders payable to the respective senders of said packages, and that in the instances set forth in the complaint as amended he failed to do as was then and there required of him, and in lieu thereof, embezzled and appropriated to his own use said funds. It is further admitted that M. O. Detlie and S. L. Robinette, as Post Office Inspectors, duly authorized in that behalf by the Postmaster General, made demand upon John A. Smith for the repayment of all funds embezzled by him, said demand being made January 16, 1922, by letter delivered to said Smith, and that in reply thereto, said Smith admitted his shortage, and his inability to make payment, which letter was written by said Smith under date of January 16, 1922. It is further admitted that all funds embezzled by Smith were funds collected at and from deliveries made by the main office at Birmingham, Alabama.

(15) It is further admitted that under date of April 11, 1923, the said Inspectors, who were duly authorized in that behalf by the Postmaster General of the United

States, made demand by letter upon Rufus B. Smyer for the payment by the said Smyer of the money embezzled by Smith, which letter was delivered to and received by the said Postmaster, and that again under date of May 31st, 1923, by letter, said Post Office Inspectors made demand on Smyer for payment of said money embezzled by said Smith, and that again under date of October 23rd, 1923, by letter said Inspectors made demand upon said Smyer for all moneys embezzled by said Smith, all of which letters were received by said Smyer, and it is also further admitted that under date of May 31st, 1923, a copy of the letter written to Rufus B. Smyer, Postmaster, Birmingham, Alabama, making demand upon said Postmaster for said money, was sent to the United States Fidelity and Guaranty Company at Baltimore, Maryland, by said Post Office Inspectors, and that said letter was received in due course of business thereafter, by the said United States Fidelity and Guaranty Company at Baltimore, Maryland. That said letters making demand upon the defendants for the payment of said shortage are not copied herein in order to abridge this stipulation. It is further admitted that under date of June 23rd, 1924, before the filing of the complaint in this cause, the United States Attorney for the Northern District of Alabama, by two letters, one written to Rufus B. Smyer, Postmaster, Birmingham, Alabama, the other to United States Fidelity and Guaranty Company, Birmingham, Alabama, which letters were received by said defendants, made demand upon each of said defendants for the payment of the amount of money sued for in this action.

It is agreed and the Court is requested to make a special finding of the facts and now that this agreement of facts be the special finding of facts by the Court.

Dated this the 24th day of November, A. D., 1924.

UNITED STATES OF AMERICA,
by C. B. KENNAMER,
U. S. Attorney.

and

E. J. SMYER,
As *Atty. for Defendants.*

MOTION FOR JUDGMENT ON BEHALF OF THE UNITED STATES

Filed Nov. 24, 1924
CHAS. J. ALLISON, CLERK

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

United States vs. Rufus B. Smyer and United States Fidelity and Guaranty Company	No. 2980.

Now come the United States of America, plaintiffs in the above-entitled cause, and move the Court to enter judgment in the above-entitled cause in favor of the plaintiffs and against the defendants, Rufus B. Smyer and United States Fidelity and Guaranty Company, for the sum of nine thousand four hundred eighty-eight dollars and fifty-four cents, $(9,488.54), the same being the sum of nine thousand two hundred fifty-seven dollars and eleven cents ($9,257.11), plus the interest thereon at the rate of six per cent per annum, from June 23, 1924.

JIM C. SMITH,
Assistant United States Attorney,
Attorney for Plaintiffs.

MOTION FOR JUDGMENT ON BEHALF OF THE DEFENDANTS

Filed Nov. 24, 1924
CHAS. J. ALLISON, CLERK

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

United States vs. Rufus B. Smyer and United States Fidelity and Guaranty Company.	Number 2980

Now come the defendants in the above entitled cause, and moves the Court to enter judgment in the above entitled cause in favor of the defendants.

E. J. SMYER,
Attorney for Defendants.

COURT RECORD

MONDAY, NOVEMBER 24TH, 1924

The District Court of the United States for the Southern Division of the Northern District of Alabama, met pursuant to adjournment; Present, Honorable W. I. Grubb, United States District Judge, Northern District of Alabama, presiding; Honorable Charles J. Kennamer, United States Attorney; Thos. J. Kennamer, United States Marshal, and Chas. J. Allison, Clerk.

JUDGMENT

Filed Nov. 24, 1924
CHAS. J. ALLISON, CLERK

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

United States vs. Rufus B. Smyer, and United States Fidelity and Guaranty Company, a corporation.	No. 2980

On November 24th, 1924, this cause coming on to be heard, demurrers filed by defendants were considered by the court and were over-ruled by the court, and the action of the court in over-ruling the demurrers the defendant then and there duly excepted. The general issue in short by consent was pleaded by the defendants. In this case, the parties by their attorneys have entered into an agreed statement of facts, the plainiff acting by and through the Assistant District Attorney, Jim C. Smith, and the defendants, by their attorney, and they have agreed that the following statement of facts is true and thereupon the court makes the following findings of facts, which are the the agreed statement of facts, as shown by a written sipulation of facts this day filed in this cause and now made a part of the record in this cause.

After the case was argued and submitted on the merits, the defendants, by attorney, made and filed a

motion for judgment in favor of the defendants, whereupon the court overruled the motion to which ruling of the court, the defendants then and there duly excepted, and thereupon the plaintiff by attorney made and filed a motion for judgment against the defendants, whereupon the court sustained the motion to which ruling of the court the defendants then and there duly excepted.

Upon the foregoing finding of facts, the court decides as a conclusion of law that the money in the custody of John A. Smith was money received by him in his capacity as assistant superintendent of mails in Birmingham, Alabama, and was money received for the sale of money orders as defined in Sec. 4045, Revised Statutes, Sec. 7577 U. S. Compiled Statutes, 1918, and was public money which the postmaster is required to keep and account for under the provisions of Sec. 3846 Revised Statutes, Sec. 7208 U. S. Compiled Statutes, 1918, and the court ascertains that Rufus B. Smyer and the surety on his official bond is liable to the plaintiff in the principal sum of nine thousand two hundred fifty-seven dollars, and eleven cents ($9,257.11), with interest thereon from June 23, 1924, the date of the demand for payment of said principal sum, at the rate of 6% per annum, which amounts in the aggregate to nine thousand four hundred eighty-eight dollars and fifty-four cents ($9,488.54).

Therefore, The Court, upon due consideration of the premises, finds in favor of the plaintiff, and ORDERS, ADJUDGES AND DECREES that the plaintiff, the United States of America is entitled to recover and shall have and recover of and from the defendant, Rufus B. Smyer and the surety on his bond, the United States Fidelity and Guaranty Company, a corporation, the sum of nine thousand four hundred eighty-eight dollars and

fifty-four cents ($9,488.54), and costs, which sum includes interest to the date hereof, for which execution or process may issue.

This the 24th day of November, 1924.

W. I. GRUBB,
U. S. District Judge.

BILL OF EXCEPTIONS

Filed Dec. 1, 1924
CHAS. J. ALLISON, CLERK

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

United States of America, *Plaintiffs,* vs. Rufus B. Smyer, and United States Fidelity and Guaranty Company, a corporation, *Defendants.*	At Law. No. 2980.

BILL OF EXCEPTIONS

The above stated cause coming on to be heard before the Hon. William I. Grubb, District Judge, on the 24th day of November, 1924, without a jury, jury having been waived, the following proceedings were had, towit:-

Upon the consideration of the demurrers filed by the defendants, the court over-ruled the demurrers to which ruling of the Court, the defendants then and there duly excepted.

The Court made a special finding of the facts, and found the facts to be as set forth in the agreed statement of facts, which are made a part of the records, and are here referred to as if fully set out herein; the defendants then made and filed a motion for a judgment to be rendered by the court in favor of the defendants in the above stated cause, which motion the court over-ruled and to this ruling of the court, the defendants then and there duly excepted.

The plaintiff then made and filed a motion for a judgment in favor of the plaintiff and against the defendants for the sum of Nine Thousand, Four Hundred and Eighty-Eight and 54/100 ($9,488.54) Dollars, which motion the court granted, and to this ruling of the court, the defendants then and there duly excepted.

There were no further proceedings in the cause.

The defendant prays that this their bill of exceptions may be allowed and signed.

E. J. Smyer & Ben F. Smith,
Attorney for the Defendants.

Allowed, this 1st day of December, 1924.

W. I. Grubb, *District Judge.*

Accepted and Approved.

Jim C. Smith,
Attorney for Plaintiff.

PETITION FOR WRIT OF ERROR

Filed Dec. 1, 1924
CHAS. J. ALLISON, CLERK

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

United States of America, *Plaintiffs,* vs. Rufus B. Smyer, and United States Fidelity and Guaranty Company, a corporation, Defendants.	At Law. No. 2980. Petition for Writ of Errors.

Comes now, Rufus B. Smyer and United States Fidelity and Guaranty Company, defendants in the above stated cause, and says that on towit, the 24th day of November, 1924, this court entered judgment in the above stated cause in favor of the plaintiff and against the defendants.

That in said judgment and the proceedings had prior thereto, in this cause, certain errors were committed, to the prejudice of the defendants, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore these defendants pray that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Fifth Circuit, for the correction of said errors; that an order be made fixing the amount of security to be given in a supersedeas bond to be filed herein, conditioned as the law directs, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to said Circuit Court of Appeals.

E. J. SMYER & BEN F. SMITH,
Attorney for Defendants.

O.K.: J.C.S.

ORDER ALLOWING

Filed Dec. 1, 1924
CHAS. J. ALLISON, CLERK

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

United States of America, *Plaintiffs,* vs. Rufus B. Smyer, and United States Fidelity and Guaranty Company, a corporation, *Defendants.*	At Law. No. 2980.

This 1st day of Dec., 1924, came the defendants, by attorney, and file in the above stated cause, and present to the court their petition, praying for the allowance of a writ of error, and assignment of errors intended to be urged by them, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Fifth Judicial Circuit; and that such other and further proceedings may be had as may be proper in the premises. On consideration whereof, the court does allow the writ of error upon the defendants giving bond, according to law, in the sum of Twelve Thousand ($12,000.00) Dollars, which shall operate as a supersedeas bond.

W. I. GRUBB,
Judge of the United States District Court for the Northern District of Alabama.

ASSIGNMENT OF ERROR

Filed Dec. 1, 1924
CHAS. J. ALLISON, CLERK

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

United States of America, *Plaintiff,* vs. Rufus B. Smyer, and United States Fidelity and Guaranty Company, a corporation, *Defendants.*	At Law. No. 2980. Assignment of Error.

The defendants in the above stated cause, in connection with their petition for a writ of error, make the following assignment of errors, which they aver occurred upon the hearing of this cause, towit:—

1. The Court erred in over-ruling the demurrer of defendants to the first count of the complaint as amended, as a whole on the stated ground,

(Ground 1) That the allegations of this count are insufficient to show a breach of the bond.

2. The court erred in over-ruling the demurrer of defendants to the third count of the complaint as amended as a whole on the stated ground,

(Ground 1) The allegations of this count are insufficient to show a breach of the bond.

3. The court erred in over-ruling the demurrer of defendants to the fourth count of the complaint as amended as a whole on the stated ground

(Ground 1) The allegations of this count are insufficient to show a breach of the bond.

4. The court erred in over-ruling the demurrer of defendants to the sixth count of complaint added by amendment as a whole on the stated ground

(Ground 1) The allegations of this count are insufficient to show a breach of the bond.

5. The court erred in over-ruling the demurrer of defendants to count 1 as amended upon the stated ground (2) the allegations are insufficient to show that Rufus B. Smyer as post master has violated any statute of the United States or any rules or regulations of the post office department promulgated pursuant to law.

6. The court erred in over-ruling defendants' demurrers to the first count of complaint as amended upon the separately stated ground

(Ground 3) That the allegations are insufficient to show that the money alleged to have been received was public money.

7. The court erred in over-ruling demurrer of defendants to count one as amended upon the separately stated ground

(Ground 5) There are no allegations sufficient to show that the defendant Smyer as post master has not accounted for, as required by law and the rules and regulations of the post office department, all money received by him as post master for money orders issued by him as post master.

8. The court erred in over-ruling demurrer of defendants to count one as amended upon the separately stated ground,

(Ground 12) There are no allegations to show that the money alleged to have been received for the sale of money orders was paid to or received by a proper official or clerk of the finance or money order department of the post office at Birmingham, Alabama, for the is-

suance of money orders, or on proper application as required by the rules and regulations of the post office department.

9. The court erred in over-ruling demurrer of defendants to count one as amended upon the separately stated ground,

(Ground 14) The allegations are insufficient to show that the defendant Smyer as post master was accountable for or was required by law to pay over the money alleged to have been received.

10. The court erred in over-ruling the demurrer of defendants to count 3 as amended upon the stated ground,

(Ground 2) The allegations are insufficient to show that Rufus B. Smyer as post master has violated any statute of the United States or any rules or regulations of the post office department promulgated pursuant to law.

11. The court erred in over-ruling defendant's demurrer to the third count of complaint as amended upon the separately stated ground,

(Ground 3) That the allegations are insufficient to show that the money alleged to have been received was public money.

12. The court erred in over-ruling demurrer of defendants to count three as amended upon the separately stated ground

(Ground 5) There are no allegations sufficient to show that the defendant Smyer as post master has not accounted for, as required by law and the rules and regulations of the post office department, all money received by him as post master for money orders issued by him as post master.

13. The court erred in over-ruling demurrer of defendant to count three as amended upon the separately stated ground,

(Ground 12) There are no allegations to show that the money alleged to have been received for the sale of money orders was paid to or received by a proper official or clerk of the finance or money order department of the post office at Birmingham, Alabama, for the issuance of money orders, or on proper application as required by the rules and regulations of the post office department.

14. The court erred in over-ruling demurrer of defendants to count three as amended upon the separately stated ground,

(Ground 14) The allegations are insufficient to show that the defendant Smyer as post master was accountable for or was required by law to pay over the money alleged to have been received.

15. The court erred in over-ruling the demurrer of defendants to count four as amended upon the stated ground,

(Ground 2) The allegations are insufficient to show that Rufus B. Smyer as post master has violated any statute of the United States or any rules or regulations of the post office department promulgated pursuant to law.

16. The court erred in over-ruling defendants' demurrer to the fourth count of complaint as amended upon the separately stated ground,

(Ground 3) That the allegations are insufficient to show that the money alleged to have been received was public money.

17. The court erred in over-ruling demurrer of defendants to count four as amended upon the separately stated ground,

(Ground 5) There are no allegations sufficient to show that the defendant Smyer as post master has not accounted for, as required by law and the rules and regulations of the post office department, all money received by him as post master for money orders issued by him as post master.

18. The court erred in over-ruling demurrers of defendants to count four as amended upon the separately stated ground,

(Ground 12) There are no allegations to show that the money alleged to have been received for the sale of money orders was paid to or received by a proper official or clerk of the finance or money order department of the post office at Birmingham, Alabama, for the issuance of money orders, or on proper application as required by the rules and regulations of the post office department.

19. The court erred in over-ruling demurrer of defendants to count four as amended upon the separately stated ground,

(Ground 14) The allegations are insufficient to show that the defendant Smyer as post master was accountable for or was required by law to pay over the money alleged to have been received.

20. The court erred in overruling the demurrer of defendants to count six added by amendment upon the stated ground,

(Ground 2) The allegations are insufficient to show that Rufus B. Smyer as postmaster has violated any statute of the United States or any rules or regulations of the post office department promulgated pursuant to law.

21. The court erred in over-ruling defendants' de-

murrer to the sixth count of complaint by amendment upon the separately stated ground,

(Ground 3) That the allegations are insufficient to show that the money alleged to have been received was public money.

22. The court erred in over-ruling demurrer of defendants to count six added by amendment upon the separately stated ground,

(Ground 5) There are no allegations sufficient to show that the defendant Smyer as post master has not accounted for, as required by law and the rules and regulations of the post office department, all money received by him as postmaster for money orders issued by him as postmaster.

23. The court erred in over-ruling demurrer of defendants to count six added by amendment upon the separately stated ground,

(Ground 12) There are no allegations to show that the money alleged to have been received for the sale of money orders was paid to or received by a proper official or clerk of the finance or money order department of the post office at Birmingham, Alabama, for the issuance of money orders, or on proper application as required by the rules and regulations of the post office department.

24. The court erred in over-ruling demurrer of defendants to count six as added by amendment upon the separately stated ground,

(Ground 14) The allegations are insufficient to show that the defendant Smyer as post master was accountable for or was required by law to pay over the money alleged to have been received.

25. The court erred on defendants' due written request and motion after the court had made a finding of the facts in over-ruling the motion for judgment in favor of the defendants.

26. The court erred in granting on plaintiff's due written request and motion after the court has made a finding of the facts in granting the motion for judgment in favor of the plaintiff and against the defendants.

WHEREFORE the defendants pray that said judgment be reversed or reversed and rendered.

E. J. SMYER & B. F. SMITH,
Attorneys for Defendants.

Presented and granted, this 1st day of December, 1924.

W. I. GRUBB,
District Judge.

BOND

Filed Dec. 1, 1924
CHAS. J. ALLISON, CLERK

KNOW ALL MEN BY THESE PRESENTS: That we, Rufus B. Smyer and United States Fidelity and Guaranty Company, a corporation, as principals, and E. J. Smyer and S. B. Smyer, as sureties, are held and firmly bound unto the United States of America, in the full and just sum of Twelve Thousand and no/100 Dollars, to be paid to the said United States of America, its certain attorneys, executors, administrators or assigns: to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this 1st day of December, in the year of our Lord one thousand nine hundred and twenty-four.

Whereas, lately at a regular term of the District Court of the United States, for the Southern Division of the Northern District of Alabama, in a suit pending in said Court between United States of America, Plaintiff, and Rufus B. Smyer and United States Fidelity and Guaranty Company, a corporation, Defendants, a judgment was rendered against the said Defendants, and the said Defendants having obtained a Writ of Error and filed a copy thereof in the Clerk's office of the said Court to reverse the Judgment, in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing It to be and appear at THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, to be holden at New Orleans, La., within_____days from the date hereof.

Now, the Condition of the Above Obligation Is Such, that if the said Rufus B. Smyer, and United States Fidelity and Guaranty Company, a corporation, shall prosecute said Writ of Error to effect, and answer all damages and costs if they fail to make the said plea good, then the above obligation to be void; else to remain in full force and virtue.

RUFUS B. SMYER (Seal)
UNITED STATES FIDELITY
& GUARANTY COMPANY,
By B. F. Smith, Atty. (Seal)
E. J. SMYER, (Seal)
S. B. SMYER. (Seal)

Sealed and delivered in presence of

Approved by W. I. GRUBB,
Judge of the United States District Court,
Northern District of Alabama.

WRIT OF ERROR

Issued Dec. 1, 1924
CHAS. J. ALLISON, CLERK

UNITED STATES OF AMERICA, ss.

THE PRESIDENT OF THE UNITED STATES,
To the Honorable Judges of the Circuit Court of the United States for the Fifth Judicial Circuit—
GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between The United States of America versus R. B. Smyer and United States Fidelity & Guaranty Company a manifest error hath happened, to the great damage of the said R. B. Smyer and United States Fidelity & Guaranty Company as by their complaint appears We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, together with this writ, so that you have the same at New Orleans, Louisiana, within thirty days from the date hereof, in the said United States Circuit Court of Appeals, to be then and there held, and the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and ac-

cording to the laws and customs of the United States should be done.

Witness the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, the 1st day of December, in the year of our Lord one thousand nine hundred and twenty-four.

(Seal) CHAS. J. ALLISON,
Clerk of the U. S. District Court
Northern District of Alabama.

Allowed by W. I. GRUBB,
Judge of the United States District Court,
Northern District of Alabama.

CITATION

UNITED STATES OF AMERICA.

THE PRESIDENT OF THE UNITED STATES,

To the United States of America, C. B. Kennamer, United States District Attorney—GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Fifth Judicial Circuit to be holden at New Orleans, La.

Pursuant to a writ of error, filed in the Clerk's Office of the District Court of the United States for the Southern Division of the Northern District of Alabama, wherein R. B. Smyer and United States Fidelity and Guaranty Company, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States this 1st day of December, in the year of our Lord one thousand nine hundred and twenty-four.

(Seal)

W. I. GRUBB,
U. S. Dist. Judge.

I hereby accept service of this citation. This 1st day of Dec., 1924.

C. B. KENNAMER,
U. S. Atty.

By JIM C. SMITH,
Asst. U. S. Atty.

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ALABAMA.

I, Chas. J. Allison, Clerk of the District Court of the United States for the Northern District of Alabama, Southern Division, do hereby certify that the foregoing pages numbered from one (1) to eighty-three (83), both inclusive, is a full, true and correct transcript in the matter of Rufus B. Smyer, and United States Fidelity and Guaranty Company, a corporation, plaintiffs in error, vs. United States of America, defendant in error, as fully as the same appears of record and on file in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my hand and affixed the seal of said court on this the 30 day of January, A.D. 1925.

Chas J Allison

Clerk United States Court,
Northern District of Alabama.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ARGUMENT AND SUBMISSION—April 16, 1925

On this day this cause was called, and, after argument by E. J. Smyer, Esq., for plaintiffs in error, and Jim C. Smith, Esq., Assistant United States Attorney, for defendant in error, was submitted to the Court.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

OPINION—Filed May 8, 1925

E. J. Smyer for Plaintiffs in Error.
Jim C. Smith, Asst. U. S. Atty. for Defendant in Error.

Before Walker, Bryan and Foster, Circuit Judges

BRYAN, Circuit Judge:

This is a writ of error to review a judgment recovered by the United States in a suit upon the official bond of Rufus B. Smyer as postmaster at Birmingham. The bond is conditioned that the postmaster should "faithfully discharge all the duties and trusts imposed on him by law and by the regulations of the Post Office Department."

The facts were agreed upon. John A. Smith, a civil service employee, was assistant superintendent of mails. It was his duty to deliver the amounts received by him from collections on C. O. D. parcel post packages to an employee in the money order division in order that money orders might be issued and mailed to the senders of the packages. It appears that the postmaster was not guilty of any wrongdoing, or even of negligence. The judgment was for $9,257.11, that being the amount which the employee Smith collected on C. O. D. parcel post packages and converted to his own use.

The Government relies on R. S. §3846, which requires postmasters to keep safely all public money collected by them or which may come into their possession. It is contended on behalf of defendants that the money collected upon delivery of the C. O. D. parcel post packages was not public money, but belonged to the senders of the packages, and that the assistant superintendent of mails held it, not as a post office employee, but in his individual capacity in trust for private owners. In our opinion money received by a post office employee to be used for purchasing a money order at once becomes public money. It was intended that the Post Office Department should keep the actual money collected by it, and discharge its obli-

gation by delivering to the person entitled its order for other money. Section 4015 of the Revised Statutes provides that "All money received for the sale of money orders * * * shall be deemed and taken to be money order funds and money in the Treasury of the United States." It can hardly be dou'ted that money order funds are public funds. Foster v. United States, 257 Fed. 207. But, it is insisted that this section does not apply until the purchase of a money order has actually been made. United States v. Mann, 160 Fed. 552, decided by the district court for the Southern District of Georgia is cited to support this position. That decision is contrary to the ruling of this court in Foster v. United States, supra.

The money received by the assistant superintendent of mails for the sale of money orders being public money belonging to the Post Office Department, the postmaster became liable for its safe keeping. The fact that it was embezzled by an employee of the post office without any fault on the part of the postmaster is no defense to a suit upon the postmaster's bond. Smythe v. United States, 107 Fed. 376, decided by this court and affirmed in 188 U. S. 156. In that case the Supreme Court, after a full review of the authorities, held that the obligations of a bond are not determinable by the law of bailment, but by the terms of the bond.

It is argued that a postmaster ought not to be held liable on his bond because C. O. D. parcel post packages are insured by the Government, and that to allow a recovery is to permit the Government to make postmasters liable for such insurance. A similar contention with reference to Treasury notes was held to be untenable by the Supreme Court in the Smythe case.

The judgment is affirmed.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

JUDGMENT—May 8, 1925

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Alabama, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause, be, and the same is hereby, affirmed.

IN U. S. CIRCUIT COURT OF APPEALS

[Title omitted]

PETITION FOR APPEAL—Filed May 26, 1925

The above mentioned appellants, R. B. Smyer and United States Fidelity and Guaranty Company respectfully show that the above

entitled cause is now pending in the United States Circuit Court of Appeals for the Fifth Circuit, and that a judgment therein has been rendered on the 8th day of May, A. D. 1925, affirming the judgment of the District Court of the United States for the Southern Division of the Northern District of Alabama, and that the matter in controversy in said suit exceeds One Thousand Dollars besides costs; that this cause is one in which the United States Circuit Court of Appeals for the Fifth Circuit has jurisdiction, and that it is a proper cause to be reviewed by the Supreme Court of the United States of America, on appeal.

Wherefore the said appellants pray that an appeal be allowed them in the above entitled cause, directing the clerk of the United States Circuit Court of Appeals for the Fifth Circuit, to send the records and proceedings in said cause, with all things concerning the same to the Supreme Court of the United States of America, in order that the errors complained of in the Assignment of Errors herewith filed by the said appellants may be reviewed and if errors be found, corrected according to the laws and customs of the United States of America.

(Signed) E. J. Smyer, Attorney for Appellants.

IN U. S. CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER ALLOWING APPEAL—Filed May 26, 1925

The appellants in the above stated cause, having presented their petition for an appeal to the Supreme Court of the United States of America, and having presented an assignment of errors intended to be urged by them, and praying also that records and proceedings upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States of America, and that such other and further proceedings may be had as may be proper in the premises. On consideration whereof, the petition is granted and it is hereby ordered that an appeal in the above entitled cause to the Supreme Court of the United States of America, be and is hereby allowed as prayed upon the appellants giving bond according to law in the sum of Thirteen Thousand ($13,000.00) Dollars, which shall operate as a supersedeas bond.

May 23, 1925.

(Signed) R. W. Walker, Judge United States Circuit Court of Appeals, Fifth Circuit.

BOND ON APPEAL FOR $13,000.00—Approved and filed May 26, 1925; omitted in printing

IN U. S. CIRCUIT COURT OF APPEALS

[Title omitted]

ASSIGNMENTS OF ERROR—Filed May 26, 1925

The appellants in the above entitled cause, in connection with their petition for appeal, herein present and file therewith, their assignment of errors as to which matter and things they say the decree or judgment entered herein on the 8th day of May, 1925, is erroneous, to wit:

First. The Court erred in affirming the judgment or decree of the District or lower Court.

Second. The Court erred in adjudging that the money collected by John A. Smith on C. O. D. parcel post packages and converted by said Smith to his own use, was public money under the provisions of Sec. 3846 Revised Statutes.

Third. The Court erred in adjudging that the money collected by John A. Smith on C. O. D. parcel post packages and converted by said Smith to his own use, was money order funds under the provisions of Sec. 4045 of the Revised Statutes.

Fourth. The Court erred in adjudging that the Nine Thousand, Two Hundred and Fifty-Seven and 11/100 ($9,257.11) Dollars, the amount collected by John A. Smith on C. O. D. parcel post packages, and converted by said Smith to his own use, was public money under the provisions of Sec. 3846 Revised Statutes, and for which appellant, R. B. Smyer, the postmaster became liable for its safe keeping.

Wherefore the appellants pray that said judgment or decree of said Circuit Court of Appeals may be reversed in all things and that the appellants may have an adjudication and judgment or decree in their favor.

(Signed) E. J. Smyer, Attorney for Appellants.

IN UNITED STATES CIRCUIT COURT OF APPEALS

CLERK'S CERTIFICATE

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 85 to 94 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 4509, wherein R. B. Smyer and United States Fidelity and Guaranty Company are plaintiffs in error, and United States of

America is defendant in error, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 84 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 26th day of May, A. D. 1925.

Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals, Fifth Circuit. (Seal of United States Circuit Court of Appeals, Fifth Circuit.)

CITATION—In usual form, showing service on Jas. M. Beck; omitted in printing

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Endorsed on cover: File No. 31,243. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 520. R. B. Smyer and United States Fidelity and Guaranty Company, appellants, vs. The United States of America. Filed June 1st, 1925. File No. 31,243.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 131

RUFUS B. SMYER AND UNITED STATES FIDELITY AND GUARANTY COMPANY
Appellants,

vs.

THE UNITED STATES OF AMERICA
Appellee.

ON APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

BRIEF AND ARGUMENT,
BY E. J. SMYER,
Attorney for Appellants.

Birmingham Publishing Co.—50—11-14-25

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 520

RUFUS B. SMYER AND UNITED STATES FIDELITY AND GUARANTY COMPANY
Appellants,

vs.

THE UNITED STATES OF AMERICA
Appellee.

ON APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

BRIEF AND ARGUMENT,
BY E. J. SMYER,
Attorney for Appellants.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 520

RUFUS B. SMYER AND UNITED STATES FIDELITY AND GUARANTY COMPANY
Appellants.

vs.

THE UNITED STATES OF AMERICA
Appellee.

PRELIMINARY STATEMENT

The opinion of Circuit Court of Appeals in this cause is reported in advance sheets, Federal Reporter Second Series, Vol. 6 (2d) No. 1, page 12; also set forth in Record (R. 85).

The Appellee brought suit on the official bond of Rufus B. Smyer, as Postmaster at Birmingham, in The District Court of the United States for the Southern Division of Northern District of Alabama, to recover $10,151.91, (R. 29, 33), the amount embezzled by one John A. Smith, without fault or negligence on the part of the Postmaster, which funds embezzled rightfully came into the custody of Smith, in his official capacity as Assistant Superintendent of Mails in the Post Office.

Smith was in charge of the parcel post mails passing through the main office of the post office; the money embezzled was money received from collections on diverse C. O. D. parcels; it was Smith's duty to purchase with this money, money orders for the shippers.

The Appellee claimed that the money embezzled was money order funds under Sec. 4045 R. S., and therefore public money under Sec. 3846 R. S., and that the Postmaster and surety was liable to account therefor. The Appellants claimed that the money embezzled was not money order funds or public money under the statutes, and that Appellants were not liable to account therefor.

The lower court held that the money embezzled was money order funds and public money, and rendered judgment against Appellants for $9,257.11, with interest thereon from June 23rd, 1924 (the date of the demand for payment). The case was carried by writ of error to Circuit Court of Appeals, Fifth Circuit and the Circuit Court of Appeals affirmed this Judgment, May 8th, 1925 (R. 65, 85, 86).

The Judgment in this cause being for more than $1,000.00, and being rendered on May 8th, 1925, the right of appeal is not affected by Act of Congress to amend the Judicial Code approved February 13th, 1925, which did not become effective until May 13th, 1925, under provisions of said Act.

CONCISE STATEMENT OF CASE.

Appellant, Rufus B. Smyer, was Postmaster at Birmingham, Alabama, from January 6th, 1916 to and including August 20th, 1924. He served two terms with hold-overs; his last term commenced February 4th, 1920,and ended February 4th, 1924; he held over until

his successor was appointed, and qualified, August 20th, 1924. (R. 45).

Appellee filed suit in the District Court of the United States for the Southern Division of the Northern District of Alabama, against the Appellants, on July 3rd, 1924, the suit being on the bond of the Postmaster, which bears date February 10th, 1920, and was accepted March 2nd, 1920. The material condition of this bond sued on is, "*That if the said Rufus B. Smyer shall faithfully discharge all duties and trusts imposed on him by law, and by regulations of the Post Office Department * * * then this obligation shall be void; otherwise of force.*" (R. 5, 8). The bond is set forth in Count One of Complaint, and, by reference, in each of the other counts of the Complaint.

The amount sued for in each of the original counts of the Complaint (by amendment), and in sixth count added by amendment, was $10,151.91. (R. 29, 33).

After demurrers were over-ruled, the case was tried by the trial court without a jury (jury being waived), on an agreed statement of facts (R. 43, 44 to 59). The trial court was requested to make a special finding of the facts and found the facts to be as set forth in agreed statement of facts (R. 59, 64). After case was argued and submitted on the merits, the Defendants (in trial court), made and filed motion for judgment in favor of Defendants, which was over-ruled, and exceptions duly taken by Defendants. The Plaintiff then made and filed a motion for judgment against Defendants which was sustained, and the Defendants duly excepted. The Court rendered judgment in favor of the Plaintiff, and against the Defendants for $9,257.11, with interest thereon from June 23rd, 1924, the date of the demand for

payment of said principal sum. (R. 61, 62, 64). By writ of error, Appellants carried the case to the Circuit Court of Appeals, and by that court, the Judgment of the lower court was affirmed as hereinbefore stated.

The entire amount sued for, $10,151.91 was embezzled by one John A. Smith which consisted of collections rightfully received by Smith from carriers and clerks in discharge of his official duties as Assistant Superintendent of Mails (R. 51, 52, 53), and were collections on C. O. D. parcel post mail, made on delivery of packages from the main office by carriers and clerks to whom Smith assigned packages for delivery and collection. (R. 48, 49).

At the time Smyer was first appointed Postmaster, Smith was an employee of the Government, and held and continued to hold the position of foreman in the parcel post section of the post office until in May, 1921, when he was promoted to the position of Assistant Superintendent of Mails. While Smith was foreman, and while he was Assistant Superintendent of Mails, he handled and had charge of all C. O. D. parcel post mail, and collections therefrom passing through the main office; and as foreman or Assistant Superintendent of Mails, was in charge of all C. O. D. parcel post mail. (R. 45, 46).

During the entire time that Smyer was Postmaster, the Birmingham post office was a first class office and was operated under the two division plan, that is the office was divided into what is known as the "Finance Department" and the "Department of Mails"; all parcel post mail was handled in the "Department of Mails", and under the supervision and direction of Smith, and all money order business was handled in the "Finance

Department," in accordance with provision of regulation (R. 47); Smith had no connection with or authority or power in the "Finance Department," and under regulation, it was Smith's duty as and when he received collections on C. O. D. parcel post mail, to take the collections received and with it purchase from the money order department, money orders for shippers. (R. 49).

The embezzlements of Smith were during the months of August, September, October, and November, 1921, as shown by the tags, evidencing the embezzlements. (R. 50, 51). Smith had been carrying on his embezzlements during a period of about four years next preceding his detection, by a process of kiting; that is when he embezzled a collection on a package, he would keep the receipted tag in his private locker, under lock and key, and subsequently he would take the tag with money embezzled from another package or packages and purchase money order for the shipper whose funds had been previously embezzled, and in this way, continuously increased the amount of his embezzlements appropriated to his own use. (R. 51, 52).

During the entire time of Smith's embezzlements he embezzled only a small proportion of the C. O. D. parcel post funds coming into his custody, but used the major portion of said funds rightfully in purchasing money orders from money order clerks for shippers (R. 49). During each of the months of August, September, October, and November, 1921, Smith purchased for shippers from money order clerk money orders amounting in the aggregate to approximately $25,000.00, the money orders purchased in each of these months for shippers numbering approximately 3500 as evidenced by tag applications delivered by him to the money order clerk. (R. 50).)

In the latter part of November, 1921, Smith became sick, and left the office, and Smyer, as Postmaster, immediately ordered the mail that properly went to Smith's desk sent to Smyer's desk for consideration by him. In this mail were numerous complaints from shippers in regard to non-receipt of remittances for packages; Smyer at once investigated, could find no tags pertaining to complaints, but in some instances found where money orders had been purchased and sent to complaining shippers. After Smith had been away from the office for about one week, Smyer requested him to come in, and Smyer had an interview with him and submitted to him the numerous complaints and requested an investigation and report from Smith. Smith stayed about the office for two days and made a report to Smyer, which was not satisfactory, and Smyer at once notified the Inspector located in the post office, and also wrote a letter to the Inspector in Charge, at Chattanooga, Tenn., suggesting an investigation. Inspectors commenced an investigation very shortly thereafter, broke open Smith's private locker, and found therein 1560 tags representing, or pertaining to, the money embezzled by Smith. (R. 54, 55, 51).

Under the regulations of the Post Office Department, many of the shippers who were entitled to money embezzled by Smith, as represented by the tags, filed claims within the time prescribed by the regulations, and the Post Office Department paid insurance on said claims filed to shippers in an amount aggregating $9,-173.45; this was the total amount of money paid out by the Government on account of the defalcation of Smith. Shippers who were entitled to $894.80 of the money embezzled, never filed claims for insurance or indemnity

and their right to file claim was barred under regulations, a considerable time prior to the bringing of the suit. If Smith had taken all of the money embezzled by him, and with it purchased money orders, $83.66 of the money embezzled would have gone to the Government as money order fees that the Government would have been entitld to. (R.53).

The judgment of the trial court for $9,257.11 was for the amount that the Post Office Department paid the shippers as insurance, plus $83.66 which the Government would have been entitled to as money order fees, if money orders had been purchased with the money embezzled. (R. 53).

During Smyer's last term of office, there were approximately four hundred employees in the office, consisting of one assistant postmaster, one superintendent of mails, a number of supervisory officers, and about three hundred and seventy clerks, carriers and other employees, of which, there were approximately one hundred and twenty-seven carriers, each of whom delivered C. O. D. parcel post mail on their respective routes, and in addition, numerous clerks in the post office made delivery of C. O. D. parcel post mail at the windows, all under the direction and supervision of Smith (R. 47).

Under regulation of the Department, all C. O. D. parcel post mail was insured by the Government and was handled on the tag system, no books or accounts were kept from the time of delivery by the shipper up to the time of purchase of a money order from money order department and delivery of receipted tag to the money order department at the time of purchase. (R. 50). In August, 1920, in Washington at a conference of postmasters held and called by the Post Office Department

for the purpose of bettering the service, and hearing suggestions from postmasters, at which conference representatives of the department were present, Postmaster Smyer criticised the tag system of handling C. O. D. parcel post matter as unsafe, and recommended the keeping of records to check and trace the parcel from time of shipment to time money order was issued, and while in Washington at this conference, he had an interview with officials of the department in charge of handling claims in regard to this matter, and was told that the expense of keeping records and checking on shipments would cost more than any loss that would be sustained. (R. 54).

ERRORS ASSIGNED AND INSISTED ON

1. The Court erred in affirming the judgment of the District or Lower Court.

2. The Court erred in adjudging that the money collectd by John A. Smith on C. O. D. parcel post packages and converted by Smith to his own use, was public money under the provisions of Sec. 3846 R. S.

3. The Court erred in adjudging that the money collected by John A. Smith on C. O. D. parcel post packages and converted by said Smith to his own use, was money order funds under the provisions of Sec. 4045, R. S.

4. The Court erred in adjudging that the money collected by Smith on C. O. D. parcel post packages and converted by Smith to his own use was public money under the provisions of Sec. 3846, R. S., and for which the Appellant R. B. Smyer, the Postmaster, became liable. (R. 88).

SUMMARY

The question presented is a question of law:—Was the money embezzled by John A. Smith (without fault

or negligence on the part of the Appellant Postmaster) money order funds, or public money? If so, Appellants are liable. If not, Appellants are not liable and the judgment of the Court was error.

BRIEF AND ARGUMENT

I.

The Court takes judicial notice of the rules and regulations promulgated by the Postmaster General pursuant to authority conferred by statute, and pertinent rules, regulations and statutes are to be considered in connection with the bond sued on.

Anton Caha v. U. S., 152 U. S. 211.
Foster v. U. S., 256 Fed. Rep. 207.
U. S. v. Zabriskie, 87 Fed. Rep. 716.
Brown v. Piper, 91 U. S. 37.

"The head of each department is authorized to prescribe regulations not inconsistent with law for the Government of his department." Sec. 161 R. S.

In re parcel post:—"The Postmaster General shall provide * * * printed instructions as may be necessary in the administration of this Section." Sec. 7322 Comp. Stat. 1918.

It is agreed in the agreed statement of facts, that all rules and regulations of the Post Office Department pertinent, shall be considered as in evidence, if it be held that the same should be introduced in evidence. (R. 50).

II.

We concede that if money embezzled by Smith was "money order funds" under Sec. 4045 R. S., it was public

money under Sec. 3846 R. S., and under Smythe v United States, 188 U. S. 156, and numerous cases to the same effect, the Appellants are liable for the money embezzled.

If it was public money, the Post master and his surety would be liable if it had been taken by a highwayman, or a burglar, or destroyed by fire, and without fault or negligence of the Postmaster, and the fact that Smith was a civil service employee of the Government, would be immaterial.

Our contention is that the money embezzled was not money order funds or public money.

III.

It is settled law, in the absence of a statute imposing liability and in the absence of personal neglect, that neither a public officer or surety on his bond is liable for the wrongful acts or default of his assistants or those in service under him.

1 A. L. R. 222, et seq. and numerous cases cited.
12 A. L. R. 980, and numerous cases cited.
21 R. C. L., 746 to 748.
22 R. C. L., 487.
Raisler v. Oliver & Co., 97 Ala. 710.
Robertson v. Sichel, 127 U. S. 507.
U. S. v. Rodge, 214 Fed. Rep. 283.
Kennan v. Southworth, 110 Mass. 474 (14 Amer. Rep. 613).

There is no statute or regulation of the Post Office Department which holds the Postmaster responsible for the honesty, ability, integrity, or faithfulness of any

subordinate under him (except in case of public money or property, and as to these, the Postmaster is held accountable). The Appellant Postmaster was not guilty of wrongdoing or negligence (R. 44, 59). The Circuit Court of Appeals in opinion says: "It appears that the Postmaster was not guilty of any wrong doing or even of negligence." (R. 85).

IV.

The money embezzled by Smith was not money order funds. It was not "Money received for the sale of money orders" under Sec. 4045 *R. S.*

This statute was enacted in 1872. The parcel post law was enacted in 1912. This statute is as follows:

"All money received *for the sale of money orders, including all fees thereon,* all money transferred from the postal revenues to the money-order funds, all money transferred or paid from the money-order funds to the service of the Post Office Department, and all money order funds transferred from one Postmaster to another, shall be *deemed and taken to be money-order funds* and money in the treasury of the United States. And it shall be the duty of the Assistant Treasurer of the United States to open, at the request of the Postmaster General, an account of "money order funds" deposited by postmasters to the credit of the Postmaster General, and of drafts against the amount so deposited, drawn by him and countersigned by the (Sixth Auditor)."

This statute must be contrued with reference to its meaning and what it was intended to mean at the time of its enactment.

The statute contemplates a sale and issue of a money order by a postmaster and the money received in

payment for the money order sold becomes "Money order funds." The money received is the purchase price paid for the money order sold and issued; the money received belongs to the Government in payment of fees charged and in lieu of the obligation of the Government represented by the money orders sold and issued.

No one except the postmaster or a clerk designated for that purpose is authorized to sell and issue money orders. The name of the postmaster must be signed to each money order sold by the postmaster in person, or by authorized clerk (and not stamped). When sold, it must be issued on forms furnished by the Postmaster General—These forms must be kept by the postmaster under lock and key. The postmaster or designated clerk is not authorized to make sale of money orders except on application filed with and payment of legal tender currency therefor to the postmaster or designated clerk.

"That the Postmaster General shall supply such money order offices as he may deem expedient, with blank forms of applications for money orders in such form as he may direct." Sec. 7561 Comp. Stat. 1918,; Sec. 4033 R. S. as amended.

"The Postmaster General shall furnish money order offices with printed or engraved forms for domestic money orders. * * * And no money order shall be valid unless drawn upon such form." Sec. 7562 Comp. Stat. 1918, Sec. 4034 R. S. as amended.

"Postmasters shall keep their stock of blank money order forms in their own custody, under lock and key * * * and they will be held responsible for any loss which the department may suffer arising from fraud made possible through a disregard of this regulation." Sec. 1143 P. L. & R. (1913) page 537.

"Postmasters at money order offices of the first and second class, may be allowed by Postmaster General to employ such number of clerks in the transaction of their money order business, and at such rate of compensation respectively as he may deem expedient." Sec. 7559, U. S. Comp. Stat. 1918.

"The postmaster may authorize any clerk employed in his office to sign his name to money orders and advices. The name of the postmaster shall be written, not stamped, and underneath it, the clerk shall write his own initials." Sec. 1141, P. L. & R. (1913), page 537.

"Postmasters shall not receive or pay out in the transaction of money order business, any money that is not legal tender by the laws of the United States, excepting National Bank notes, and silver certificates." Sec. 1124 P. L. & R. (1913), page 529.

It is penal offense for the Postmaster (or designated clerk) to sell and issue a money order without receiving the requisite money in payment therefor.

U. S. vs. Norton, 107 Fed. Rep. 412.

Smith was not connected with the money order division, and it was his duty to purchase money orders for shippers from money order division, with money coming into his custody, taking receipt therefor from seller of money order.

"At first and second class offices, if practicable, an employee not engaged in the money order division, must be designated by the Postmaster to have charge of the assignment of C. O. D. parcels to employees for both carrier and desk delivery. * * * The employees making delivery must turn over to the clerk in charge the receipted tags and sums collected, together with the undelivered parcels daily. * * * The clerk in charge must de-

liver daily to the money order division the amount received by him, together with the receipted tags, and should take a receipt in bulk on form 3815, showing the total sum turned over for the issuance of money orders and the total number of parcels represented thereby."

U. S. Official Postal Guide, July 1921, page 108 Sub. 68.

"The receipted tags shall be considered as the addresse's application for a money order in the amount due the sender." Sec. 489 Sub. 8, P. L. & R. (1913), page 276.

The money embezzled was not money in the treasury of the United States, subject to draft of the Postmaster General; was not money to be paid over and accounted for by the postmaster daily; was not money required to be entered by the postmaster on books of account required to be kept, for no money order was sold therefor, and the money embezzled never actually or constructively came into the custody of the Postmaster.

"It shall be the duty of postmasters at post offices authorized to issue money orders, to render to the auditor of the treasurer for the post office department monthly, semi-monthly, weekly, semi-weekly, or daily accounts of all money orders issued and paid, of all fees received for issuing them." Sec. 7576, U. S. Comp. Stat. 1918 (R. S. 4044 as amended).

'At money order offices separate accounts shall be kept of the money order business." Sec. 375 Sub. 3, P. L. & R. (1913), page 200.

"The money order accounts shall be kept separately from all other accounts, and shall be adjusted at the close of each day's business, in order that the balance of funds on hand may be accurately ascertained." Sec. 1253, P. L. & R. (1913), page 591.

"Postmasters at money order offices shall remit daily to the depository designated by special instructions, to each office." Sec. 1241, P. L. & R. (1913), page 586.

It is settled law that to constitute a valid sale, there must be a concurrence of the following elements:

1st, Parties competent to contract; 2nd, Mutual assent; 3rd, A thing, the absolute or general property in which is transferred from the seller to the buyer; 4th, A price in money paid or promised.

A sale is an executed (not an executory) contract by which property is transferred from seller to buyer. A sale divests the seller of title, and invests title in the buyer.

Elliott on Contracts, Vol. 5, Sec. 4981, page 1137.

Butler vs. Thompson, 92 U. S. 412 (23 Law Ed 684).

Martin vs. State, 59 Ala. 34.

Allen Bethune & Co., vs. Maury & Co., 66 Ala. 10.

Foley vs. Felrath, 98 Ala. 176.

Marts vs. Cumberland Mutual Fire Insurance Co., 44 N. J. (Law), 478-481.

State vs. Wentworth, 35 N. H. 442.

Riley vs. State, 43 Miss. 397, 414.

Howard vs. Harris, 90 Mass. (8 Allen) 297, 299.

Clemons vs. Davis, 7 Pa. (7 Barr) 263.

Cleu vs. McPherson, 14 N. Y. Sup. Ct. (1 Bosw) 480, 487.

U. S. vs. Norton, 107 Fed. Rep. 412.

In the case of U. S. vs. Mann, 160 Fed. Rep. 552, the court construed Sec. 4045 R. S. The defendant was indicted for embezzlement of money order funds. He was a rural letter carrier authorized by regulation of the

Department to take and receipt for money from persons desiring to purchase money orders. As such carrier, he received money for the purchase of money orders, and embezzled same.

The court holds that the money embezzled was not money order funds, and says: "It is obvious that Congress did not, in 1872 or 1873, have in mind the rural letter carrier who came within the classified service in 1902 and subsequent years."

The court further, in regard to the money embezzled, says: "It is nothing more or less than money which the regulations of the Postmaster General authorized its qualified employees to accept from the citizen with the duty of purchasing a money order therewith. It becomes no part of the money order funds until purchase has been made and then it is within the category of the first class of the definition, viz: Money received for the sale of money orders." The court further holds that a sale is an executed contract.

In Foster vs. U. S., 256 Fed. Rep. 207, (referred to in opinion in this cause), defendant was postmaster (manifestly) of a fourth class office. He was convicted of embezzlement under Sec. 4046 R. S. (Sec. 10395 Comp. Stat. 1918) which authorized a conviction where money embezzled is received under color of office, "*Whether the same shall be the money or property of the United States or not.*" He was acquitted under the second count in the indictment which charged embezzlement of money order funds.

In the opinion the Court says: "The defendant also contends that the money received by him on C. O. D. parcel post packages, to be remitted to the sender, did not constitute money order funds, and could not be con-

sidered by the jury in determining the shortage. The evidence showed that the post office regulations provided that the C. O. D. tags should be treated as applications for money orders, and that the delivering postmaster should fill out a money order on the sending post office to remit the amount collected from the addressee. The department treated such moneys as money order funds, and they clearly might be properly so treated, and this fixed their character as such. Again, the funds of this character were but a small part of the conceded balance due from defendant to the Government, and not explained by him and the rulings could have made no difference to the defendant on whom no fine was imposed."

In that case, manifestly, the postmaster in person received the C. O. D. parcel post funds and the signed tag applications for money orders, and he in person was under duty to issue "Money order."

In the case at bar, neither the Postmaster or any one authorized to sell and issue money orders received the money or tag applications, or had information of the existence of either.

V.

The money embezzled by Smith was not public money under the provisions of Sec. 3846 R. S.

This section is as follows:

"Postmasters shall keep safely, without loaning, using, depositing in an authorized bank, or exchanging for other funds, all the public money collected by them, or which may come into their possession, until it is ordered by the Postmaster General to be transferred or paid out."

A commodity shipped by C. O. D. Parcel Post is in transit from time of receipt from shipper to time of de-

livery to consignee. The money collected by the carrier or delivering clerk, on delivery of packages is in transit from time it is received until it is paid on the purchase of a money order.

The money embezzled was money *for the purchase not from the sale*, of money orders. The Government was not the owner of and did not have title to the commodity or the money paid therefor, while in transit.

When a commodity is forwarded by a carrier (an express or railroad company), C. O. D., the carrier is the agent of the seller to collect the price from the purchaser.

Pilgreen vs. State 71 Ala. 368.
Jones & Co. vs. Brewster, 79 Ala. 545.
Elliott on Contracts, Vol. 4, Sec. 3275, page 493.
Corpus Juris Vol. 11, page 939.

Public money means money of the Government, of which the Government is the absolute, unconditional owner. Money in transit which may become the money of the Government, is not public money. The proceeds from the sale of a vessel seized as a prize, or the proceeds from the sale of cotton under confiscation act, pendente lite, is not public money; it is a trust fund.

Coudert vs U. S. 175 U. S. 178 (44 Law Ed. 122).
Branch vs. U. S., 100 U. S. 673 (25 Law Ed. 759).

Money deposited by citizens of the City of Washington under the "permit system" for street improvements was not public money in any legal sense, but funds of private citizens held extra-officially by public officers.

District of Columbia vs. Petty, 229 U. S. 593, (57 Law Ed. 1343).

The money embezzled was a trust fund for private citizens held extra officially by a public officer. It was money which the regulations, authorized Smith as an official, to receive with the duty on Smith as an official of the Government to purchase money orders for the shipper.

VI.

The money embezzled by Smith was money of the shippers of C. O. D. packages. The obligation and only obligation of the Government in regard to this money was its obligation under its contract of insurance.

Congress recognized a risk to shippers in making shipment by C. O. D. parcel post and authorized the Postmaster General to make provision for indemnity to shippers, "By insurance or otherwise." Sec. 7324 U. S. Comp. Stat. 1918.

All C. O. D. parcel post packages are insured by the Government.

"Fourth class or domestic parcel post mail (except as noted in Pars. 3, 4, and 5 following), may be sent C. O. D. * * *. Such parcels are insured for not exceeding $50.00 and $100.00 respectively according to whether a ten or twenty-five cent fee was paid *against the non-receipt of return therefor if delivery and collection is effected;* and against loss, rifling, or damage in an amount equivalent to the actual value."

U. S. Official Postal Guide, July 1921, page 100, 101, Sub. 2.

The government charges and collects a premium for this insurance at the time shipment is made. Claims for indemnity or insurance must be filed with the post office department by shipper in case of loss within six months from the time parcel is mailed, or it is barred. Parcels are shipped by parcel post mail other than C. O. D. and when so shipped, are not insured, and the Government pays no indemnity on any parcel so shipped, if the package is lost, stolen or damaged.

All C. O. D. parcel post shipments (including C. O. D. parcels), are entirely on the tag system. No books or accounts are kept in regard thereto.

"No article of any class bearing the word 'insured' on the outside envelope or wrapper, or on a tag or label attached thereto, shall be accepted for mailing except insured parcel post mail." Sec. 488 Sub. 3.

"The number on the receipt shall correspond with that on the parcel, and the latter shall be marked or stamped 'insured' and an insurance tag securely attached." Sec. 488 Sub. 4, P. L. & R. (1913), pages 272, 273.

"The C. O. D. tag shall show the amount due the sender, the money order fee necessary to make remittance, and the total amount to be collected. It shall be securely attached to the parcel, which shall be numbered to correspond with the tag stamped C. O. D., and the charge to be collected plainly written thereon." Sec. 489, Sub. 5.

"The receipted tag shall be considered as the addresse's application for a money order for the amount due the sender." Sec. 489 Sub. 8 P. L. & R. (1913) page 277.

"A parcel may be forwarded in accordance with Sec. 595, without the payment of additional C. O. D. fee. When so forwarded a duplicate receipt tag shall be filed, showing the office to which it is forwarded." Sec. 489 Sub. 10, P. L. &. R. (1913), page 277.

"Records other than those authorized, must not be kept except as directed in Sec. 489, Par. 10, P. L. & R., Art.40, page 95, and 31 to 36, pages 104 to 105, of this Guide." U. S. Official Postal Guide, July 1921, page 108, Sub. 70. (Exceptions referred to in Guide pertain to undeliverable mail or C. O. D. mail returned to sender).

"The sender of a mailable parcel of fourth class matter on which the postage is fully prepaid, may have the price of the article and the charge thereon collected from the addressee on payment of a fee of ten cents in postage stamps affixed, provided the amount to be remitted does not exceed $50, and on the payment of a fee of 25 cents in postage stamps affixed, provide the amount to be remitted does not exceed $100. Such a parcel will be insured against injury or loss without additional charge in an amount equivalent to its value, including the postage paid thereon (exclusive of C. O. D. fee), in case of outright loss, but not to exceed $50, when a ten cent fee is paid and $100 when a 25 cent fee is paid." Sec. 489 Sub. 1, P. L. & R. as amended February 20th, 1920, page 275.

"Indemnity for lost insured mail shall be paid in accordance with the provisions of Sec. 971, except that no indemnity shall be paid unless the claim is made within six months from the date the parcel was mailed." Sec. 488, Sub. 13, P. L. & R., page 274.

Both the law and the regulations recognize the risk to shippers, hence the insurance by the Government on

C. O. D. packages to induce shipments. Presumably the Government (like private insurance companies), expect losses by reason of its insurance, and therefore charges and collects a premium sufficient to indemnify it against loss.

If the money embezzled was money order funds, or public money from time packages were delivered and money collected, why did the Government insure the shipper against "the non-receipt of returns if package delivered and collection effected"?

If the money embezzled was the money of the Government, eo instanti of its collection on delivery of package, the Govrenment was under obligation to account to shipper for same, by issue of money order (or otherwise) independent of insurance. Why insure, and collect a premium for insuring that the Government would discharge its obligation imposed by the collection? The embezzlement of Smith aggregated $10,151.91, (R. 53), and this was the amount sought to be recovered in the suit (R. 29, 33). The Government paid insurance or indemnity to shippers resulting from Smith's embezzlements aggregating $9,173.45, on claims filed; and of the money embezzled, $83.66 would have gone to the government as money order fees, if money orders had been purchased with the money embezzled (R.53). The judgment rendered by the lower court and affirmed by the Court of Appeals, was for $9,257.11, plus interest thereon from date of demand for payment (R. 65). The judgment was for the exact amount of insurance or indemnity paid by the Government to shippers, plus the money order fees the Government would have received if money orders had been sold and issued, or for an amount to indemnify the Government. The judgment was for

$894.80, less than the amount embezzled by Smith, and shippers who were entitled to this sum were not paid insurance or indemnity by the Government for the reason that they filed no claims within the time prescribed by the regulations (R. 53). Who lost this $894.80, the shippers or the Government?

The shippers sold the commodities which were delivered but did not receive the purchase price, therefore the shipper lost the purchase price. The Government paid no insurance or indemnity and was out nothing for this sum, therefore, the Government did not lose it, and no judgment was or should have been rendered in favor of the Government for it. For the Government, at the expense of the Postmaster (who was without fault or negligence) to profit by the embezzlement, would be unconscionable. On the basis of the judgment, if none of the shippers had filed claims for insurance, there would have been no judgment against Appellants, unless for $83.66 the amount of money order fees the Government would have been entitled to if money orders had been sold and issued.

On the other hand, if any of the money embezzled by Smith was money order funds, or public money, all of it was, and the Government was entitled to the full amount embezzled, including the $894.80

If the $894.80 was not money order funds, or public money, then none of the money embezzled was money order funds. The judgment rendered by the Court of Appeals (and lower court), is incompatable with the opinion rendered by the Court of Appeals.

There is no statute or regulation (or term of the bond), imposing the burden on the Postmaster to indemnify the Government against loss resulting from its in-

surance business. If Appellant Postmaster is liable, under similar conditions all Postmasters are liable, and if the bonds of all postmasters are good and sufficient in amount(under the opinion of the Court of Appeals) the entire burden of the insurance business carried on by the Government would be on the Postmaster without compensation.

The Government receives millions of dollars annually, as insurance premiums for insuring C. O. D. parcel post mail.

> The American Government (Revised Edition, by Frederick J. Haskins) 150.

Is it the intent of the law and /or regulations of the Department that the premiums for insurance collected by the Government shall be a largess to the Government, or that the same shall be applied to the extent necessary in paying losses under its contracts of insurance?

Respectfully Submitted,

E. J. SMYER,

Attorney for Appellants.